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Implementation of the rights of indigenous peoples

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Published: 01.01.2016

Document Version

Publisher's PDF, also known as Version of record

Citation for pulished version (APA):

Lenzerini, F., & Koivurova, T. (Eds.) (2016). *Implementation of the rights of indigenous peoples: Committee on the Rights of Indigenous Peoples Report for the 2016 Johannesburg Conference*. International Law Association.

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JOHANNESBURG CONFERENCE (2016)

IMPLEMENTATION OF THE RIGHTS OF INDIGENOUS PEOPLES

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Interim Report

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1. Introduction: Background, Mandate of the Committee and Methodology of Work*

During the fall of 2014, the Chair, the co-Chair, the Rapporteurs and some Committee members prepared a work-plan to serve as a basis for the first formal meeting of the Committee (after a small informal meeting during the combined ILA and American Society of International Law Meeting at the beginning of April 2014). The first formal meeting took place in The Hague, at the Institute for Global Justice, from 20 to 21 February 2015. The meeting attracted a good number of members and future members, some of whom took part via the Skype connection, while it was also attended by a number of observers. The initial work plan was intensely discussed during the meeting, since it would provide the direction for the work of the Committee.

The mandate of the Committee is to provide an in-depth study on the level of implementation of existing norms of international law – be it customary international law, treaty law or *soft law* – as ascertained and interpreted by the ILA Committee on the Rights of Indigenous Peoples, which completed its work at the ILA Biennial Conference held in Sofia in August 2012.¹ In particular, the present Committee aims at carefully looking at what legal, quasi-legal and practical barriers potentially block the road for existing international legal standards to translate into actual protection of indigenous peoples in a number of countries throughout the world. While the former Committee ascertained that in many countries significant practice and *opinio juris* have developed which are consistent with the provisions of the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP),² and, with respect to some rights, have risen to the

* This Section is based on the Committee's "Report of the Meeting held in The Hague on 20-21 February 2015", circulated among Committee members in September 2015.

¹ The documents produced by the ILA Committee on the Rights of Indigenous Peoples are available at <<http://www.ila-hq.org/en/committees/index.cfm/cid/1024>> (accessed 11 June 2016).

² UN General Assembly Res. 61/295 of 13 September 2007.

level of customary international law, a range of problems remain which often hinder the full realization of the UNDRIP provisions and pertinent customary international law. Such problems need to be addressed taking as guidance *ILA Resolution No. 5/2012*,³ which endorsed with a virtually unanimous vote and without any objections the findings and conclusions arising from the work of the former Committee. As to actual practical problems, one can refer to the fact that indigenous peoples are often confronted with discrimination and social, economic, and political marginalization. Other major violations of their rights relate to denial of justice, such as arbitrary arrests, unjust imprisonment and related inhumane treatment, denial of liberty of association, and collective punishment. In some cases, such violations arise solely as a result of their efforts to promote or safeguard their human rights. Other violations relate to reluctance shown by governments to recognize and implement in practice indigenous peoples' rights to lands and resources or cultural rights, as well as to lack of access to schools and health facilities, political recognition, representation, and participation. Often, the rights of indigenous peoples to their lands, territories, and resources have not been secured, leaving them with little or no access to natural resources on their territories and to their traditional economies. In some cases, they are forcibly removed from their lands in order for others, including foreign investors and multinational companies, to exploit their resources. Given the inter-related, interconnected, indivisible and inter-dependent nature of indigenous peoples' human rights, each violation of the latter reverberates on the whole social and cultural structure of the communities concerned. Denial of land rights, in particular, translates into the impossibility for indigenous peoples to enjoy their internationally recognized cultural and other rights, to maintain a livelihood of their own choice, to determine their own priorities for development, or, even more important, to foster and transmit their cultural identity to future generations. A key issue – in many ways: *the issue* – therefore relates to land rights, which are the focus of the mandate of the Committee, embedded in the notion that all indigenous peoples' human rights have a strong cultural dimension, the recognition of which is at the foundation of their very existence. At the same time, however, the approach of the Committee is based on the assumption that all the different human rights recognized by international law in favour of indigenous peoples are strictly interrelated and inseparable from each other. This relates, *inter alia*, to the interplay between economic and cultural rights.

In terms of legal standards used by the Committee to ascertain the level of effective implementation of the rights of indigenous peoples in the real world, priority is given to the standards established by the UNDRIP. However, attention is also devoted to other pertinent international legal standards, particularly pertinent rules of customary international law (which reflect some of the standards provided for by the UNDRIP), *ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries* of 1989 (*ILO Convention 169*),⁴ as well as other international instruments and/or rules which are directly or indirectly relevant to indigenous peoples, including (but not limited to) the *International Covenant on Civil and Political Rights* (ICCPR)⁵ and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),⁶ the 1965 *Convention on the Elimination of All Forms of Racial Discrimination*,⁷ the 1989 *Convention on the Rights of the Child*,⁸ the 1992 *Convention on Biological Diversity*⁹ and its *Nagoya Protocol*,¹⁰ as well as bilateral treaties between the states and indigenous peoples. Furthermore, the case-law of the Inter-American Court of Human Rights (IACtHR) is devoted special attention, together with the practice of other human rights monitoring bodies, including the African Commission on Human and Peoples' Rights, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination and the Committee of the Rights of the Child. Last but not least, the interplay between the domestic, national, regional and international level is also considered. More in general, the Committee's approach consists in considering any type of norms which are relevant to its study, irrespective of whether these are strictly legally binding or not.

As for the methodology used by the Committee, a range of cases have been studied, in order to collect empirical material for providing a response to the question concerning the way and the extent to which international legal obligations on the rights of indigenous peoples are actually implemented at the domestic level. The Committee has selected a number of key case studies from all regions of the world, so as to ensure that the study provides global coverage of the status of indigenous peoples on the planet. The study of the said cases has been carried out through applying an interdisciplinary analysis of them, taking into account relevant social, cultural and – in particular – legal factors, ranging from indigenous customs, practices, land tenure systems and law, as well as national, regional, and international law with a view to identifying an effective resolution of the existing conflicts hindering the effective realization of indigenous peoples'

³ ILA Resolution No. 5/2012, available at <<http://www.ila-hq.org/en/committees/index.cfm/cid/1024>> (accessed 11 June 2016).

⁴ The full text of the Convention is available in the ILO website, at <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> (accessed 20 May 2016).

⁵ 999 UNTS 171.

⁶ 993 UNTS 3.

⁷ 660 UNTS 195.

⁸ 1577 UNTS 3.

⁹ 1760 UNTS 79.

¹⁰ *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity*, 2010, available at <<https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>> (accessed 20 May 2016).

rights. In the context of this work, particular attention is devoted to cultural factors as well as to the cultural implications arising from violations of indigenous peoples' rights, culture being the cornerstone of the very existence of those peoples. Consideration is also paid to economic factors and actors, with a focus on States and third parties, including multinational companies, and the role they are playing, positively and negatively, in the lives of indigenous communities. The examination of the selected case studies is also aimed at identifying and selecting "best practices" relating to countries that have implemented or are attempting to implement the UNDRIP standards and provisions and imagining how such practices could be applied to other areas, taking into account existing cultural and social differences. Furthermore, through comparing the different case studies, the Committee aims at drawing general conclusions concerning whether and to which extent the recent evolution of international law in the field of indigenous peoples' rights has led to further concrete outcomes translating into positive impacts on the lives of indigenous peoples and communities. Last but not least, the Committee also pursues the objective of defining strategies which might be easily applied worldwide by a variety of legal researchers and activists, as well as to contribute to the prevention of future violations of indigenous peoples' rights.

2. The Current Status of International Law on the Rights of Indigenous Peoples**

An inclusive summary of the current status and rights of indigenous peoples under international law is provided by ILA Resolution No. 5/2012,¹¹ which, as noted in the previous section, is used as guidance for the work of the Committee. Resolutions of the International Law Association have been recognized as evidence of international law under Article 38(1)(d) of the International Court of Justice (ICJ) Statute. The *Third Restatement of Foreign Relations Law of the United States* affirms this characterization.¹² As stated by Graf Vitzthum, global resolutions of a body as qualified and diverse as the International Law Association are stating a rare consensus amongst, at times, radically different cultures and value traditions, and thus should be especially appreciated,¹³ transcending the relevance of the writings of individual scholars. This is particularly true when, as in this case, a resolution passes not only uncontested, but with emphatic support.¹⁴ According to Conclusion no. 1 of the Resolution, indigenous peoples "are holders of collective human rights aimed at ensuring the preservation and transmission to future generations of their cultural identity and distinctiveness. Members of indigenous peoples are entitled to the enjoyment of all internationally recognised human rights – including those specific to their indigenous identity – in a condition of full equality with all other human beings". The legal standards defining the nature and content of such rights are enshrined in the UNDRIP, which – as is well known – is in principle a declaration of non-binding character. However, although as a whole the UNDRIP "cannot yet be considered as a statement of existing customary international law [...] it includes several key provisions which correspond to existing State obligations under customary international law".¹⁵ These obligations concern the areas of self-determination, autonomy or self-government, cultural rights and identity, land rights as well as reparation, redress and remedies.¹⁶ In particular, Conclusion No. 7 of ILA Resolution No. 5/2012 affirms that "States must comply – pursuant to customary and applicable conventional international law – with the obligation to recognise, respect, safeguard, promote and fulfil the rights of indigenous peoples to their traditional lands, territories and resources".

As for the provisions included in the UNDRIP which do not yet correspond to customary international law, they

"nevertheless express the aspirations of the world's indigenous peoples, as well as of States, in their move to improve existing standards for the safeguarding of indigenous peoples' human rights. States recognised them in a 'declaration' subsumed 'within the framework of the obligations established by the Charter of the United Nations to promote and protect human rights on a non-discriminatory basis' and passed with overwhelming support by the United Nations General Assembly. This genesis leads to an expectation of maximum compliance by States and the other relevant actors. The provisions included in UNDRIP represent the parameters of reference for States to define the scope and content of their existing obligations – pursuant to customary and conventional international law – towards indigenous peoples".¹⁷

The fact that the UNDRIP represents more than a mere *soft-law* instrument of hortatory character is corroborated not only by the Preamble to the UNDRIP itself – stating that, in adopting the UNDRIP, the U.N. General Assembly was guided "by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter"¹⁸ – but also by the practice of international human rights monitoring

** This Section has been written by Federico Lenzerini, Co-Rapporteur of the Committee.

¹¹ ILA Resolution No. 5/2012, n. 3 above.

¹² American Law Institute, *Third Restatement of the Foreign Relations Law of the United States*, § 103 Reporters' Notes No. 1 (1987).

¹³ W. Graf Vitzthum, in W. Graf Vitzthum (ed.), *Völkerrecht* (3d ed.), Berlin/New York, 2004, p. 72, para. 147.

¹⁴ S. Wiessner, "The State and Indigenous Peoples: The Historic Significance of ILA Resolution No. 5/2012," in M. Breuer et al. (eds.), *Der Staat im Recht* Berlin, 2013, p. 1368.

¹⁵ ILA Resolution No. 5/2012, n. 3 above, Conclusion No. 2.

¹⁶ See ILA Committee on the Rights of Indigenous Peoples, "The Hague Conference (2010) Interim Report", n. 1 above, p. 43.

¹⁷ See ILA Resolution No. 5/2012, n. 3 above, Conclusion No. 3.

¹⁸ See first recital of the UNDRIP Preamble.

bodies. For instance, the Committee on Economic, Social and Cultural Rights has affirmed that proper realization of the right to take part in cultural life established by Article 15.1(a) ICESCR presupposes that “all indigenous peoples [...] have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law, *as well as the United Nations Declaration on the Rights of Indigenous Peoples*”.¹⁹ In a similar vein, the African Commission on Human and Peoples’ Rights has used the UNDRIP as parameter of reference for defining the nature and scope of indigenous peoples’ rights,²⁰ while the Committee on the Rights of the Child has affirmed the Declaration as international standard on the basis of which States should “adopt a rights-based approach to indigenous children”.²¹

In addition to customary international law and the UNDRIP, indigenous peoples’ rights are affirmed and protected by ILO Convention 169, which provides in particular for a wide measure of cultural rights, land rights and labour rights for indigenous communities and their members. The problem with ILO Convention 169 is that, at the moment of this writing, it has been ratified by 22 States only, fifteen of which are Latin American countries.²² Outside such a geographical context, therefore, the impact played by the Convention, so far, has been virtually imperceptible. However, for the purposes of the work of the present Committee, ILO Convention 169 is to be recognized of significant weight especially with regard to the Latin American geographical context, where it has a notable impact.

Other human rights treaty provisions contribute to reinforcing international standards on indigenous peoples’ human rights especially thanks to their evolutionary interpretation as provided by competent monitoring bodies. It is the case, for example, of Article 27 ICCPR²³ – interpreted by the Human Rights Committee as implying the existence of an obligation “to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion”,²⁴ as well as to safeguard all different forms in which culture manifests, “including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law”.²⁵ To a similar extent, the Committee on Economic, Social and Cultural Rights has interpreted Article 15 ICESCR as presupposing a State obligation to

take measures to guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples. The strong communal dimension of indigenous peoples’ cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired [...] States [...] must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories [...] [States should also] respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by [indigenous peoples’] specific rights.”²⁶

Another relevant example is provided by the practice of the Committee on the Elimination of Racial Discrimination (CERD Committee), which has held that, in order to prevent discrimination against indigenous peoples, States have an obligation to take a number of measures, aimed in particular at

(a) Recogniz[ing] and respect[ing] indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation; (b) Ensur[ing] that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous

¹⁹ See General Comment No. 21, “Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)”, U.N. Doc. E/C.12/GC/21 of 21 December 2009, para. 7 (emphasis added).

²⁰ See Communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 25 November 2009, available at <https://www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_0.pdf> (accessed 20 May 2016), *passim*.

²¹ See General Comment No. 11 (2009), “Indigenous children and their rights under the Convention”, U.N. Doc. CRC/C/GC/11 of 12 February 2009, para. 82.

²² See <http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314> (accessed 20 May 2016).

²³ Article 27 ICCPR establishes that “[i]n those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”.

²⁴ See General Comment No. 23(50) (art. 27), U.N. Doc. CCPR/C/21/Rev.1/Add.5 of 26 April 1994, para. 6.2.

²⁵ *Ibid.*, para. 7.

²⁶ See General Comment No. 21, “Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)”, n. 19 above, paras. 36-37 (footnotes omitted).

origin or identity; (c) Provid[ing] indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics; (d) Ensur[ing] that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent; (e) Ensur[ing] that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.²⁷

Last but not least, the practice of the IACtHR is worth emphasizing, especially as regards the interpretation provided by the Court to Article 21 of the 1969 *American Convention on Human Rights*,²⁸ considered as covering protection of land rights of indigenous peoples over their ancestral territories.^{29,30}

Outside the context of human rights law *stricto sensu*, Article 8(j) of the Convention on Biological Diversity³¹ is worth mentioning. According to this provision, in the context of *in-situ* conservation of biological diversity, “[s]ubject to its national legislation, [each State party shall, as far as possible and as appropriate,] respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices”. This provision has been implemented in 2010 through the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity.³²

As regards the specific human rights standards concerning indigenous peoples – which are to be mainly conceived as *collective* rights – the most important ones, as detailed by ILA Resolution No. 5/2012, are the following:

(a) *right to self-determination*, “conceived as the right [of indigenous peoples] to decide their political status and to determine what their future will be, in compliance with relevant rules of international law and the principles of equality and non-discrimination”,³³

(b) *right to autonomy or self-government*, “which translates into a number of prerogatives necessary in order to secure the preservation and transmission to future generations of their cultural identity and distinctiveness. These prerogatives include, *inter alia*, the right to participate in national decision-making with respect to decisions that may affect them, the right to be consulted with respect to any project that may affect them and the related right that projects significantly impacting their rights and ways of life are not carried out without their prior, free and informed consent, as well as the right to regulate autonomously their internal affairs according to their own customary laws and to establish, maintain and develop their own legal and political institutions”,³⁴

(c) *right to cultural identity* (in all its elements, including cultural heritage), which must be “safeguarded in a way that is consistent with the perspectives, needs and expectations of the specific indigenous peoples [concerned]”,³⁵ so as to allow them to keep such identity genuine and transmit it to future generations without external interferences;

(d) *right to traditional lands, territories and resources (land rights)*, “which include the right to restitution of the ancestral lands, territories and resources of which they have been deprived in the past. Indigenous peoples’ land rights must be secured in order to preserve the spiritual relationship of the community concerned with its ancestral lands, which is an essential prerequisite to allow such a community to retain its cultural identity, practices, customs and institutions”,³⁶

(e) *right to establish their own educational institutions and media, as well as to provide education to indigenous children in their traditional languages and according to their own traditions*;³⁷

²⁷ See General Recommendation No. XXIII: Indigenous Peoples, 18 August 1997, available at <http://www.minoritycentre.org/sites/default/files/cerd_gen_rec_23_indigenous.pdf> (accessed 21 May 2016), para. 4.

²⁸ *O.A.S. Treaty Series* No. 36. Article 21, concerning the right to property, states at para. 1 that “[e]veryone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society”.

²⁹ Among the many pertinent judgments see *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Series C No. 79, Judgment of 31 August 2001; *Case of the Yakye Axa Indigenous Community v. Paraguay*, Series C No. 124, Judgment of 17 June 2005; *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Series C No. 146, Judgment of 29 March 2006; *Case of the Saramaka People v. Suriname*, Series C No. 172, Judgment of 28 November 2007; *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, Series C No. 214, Judgment of 24 August 2010; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Series C No. 245, Judgment of 27 June 2012.

³⁰ For a more comprehensive assessment of the relevant practice, see ILA Committee on the Rights of Indigenous Peoples, “The Hague Conference (2010) Interim Report”, n. 1 above, *passim*.

³¹ See n. 9 above.

³² See n. 10 above.

³³ See ILA Resolution No. 5/2012, n. 3 above, Conclusion No. 4.

³⁴ *Ibid.*, Conclusion No. 5.

³⁵ *Ibid.*, Conclusion No. 6.

³⁶ *Ibid.*, Conclusion No. 7.

³⁷ *Ibid.*, Conclusion No. 8.

(f) *right to reparation and redress* “for wrongs they have suffered, including rights relating to lands taken or damaged without their free, prior and informed consent. Effective mechanisms for redress – established in conjunction with the peoples concerned – must be available and accessible in favour of indigenous peoples. Reparation must be adequate and effective, and, according to the perspective of the indigenous communities concerned, actually capable of repairing the wrongs they have suffered”.³⁸

Hence, the rights just listed represent the main standards that States have to comply with *vis-à-vis* indigenous peoples. However, they do not exhaust the list of State obligations existing in the field of indigenous peoples’ rights, as others ensue directly or indirectly from existing pertinent instruments and rules, including instruments which may be considered *sui generis*, i.e. “treaties, agreements and other constructive arrangements concluded with States or their successors”.³⁹ With respect to the latter, ILA Resolution No. 5/2012 affirms that “States must cooperate in good faith with indigenous peoples in order to give full recognition and execution to treaties and agreements concluded with indigenous peoples in a manner respecting the spirit and intent of the understanding of the indigenous negotiators as well as the living nature of the solemn undertakings made by all parties”.⁴⁰ It is important to note that, according to the preferred interpretation, the treaties and agreements in point “retain their original character as international legal agreements, with the attendant consequences of customary international law governing their validity, interpretation and termination”.⁴¹ As final remark, it is worth reiterating that, generally speaking, the rights of indigenous peoples cannot be considered in isolation from each other, “for the reason that – in light of the holistic vision of life of indigenous peoples – [such rights] are all strictly interrelated with each other as building blocks of the unique Circle of Life representing the heart of indigenous peoples’ identity, to the extent that ‘the change of one of its elements affects the whole’”.⁴²

3. Analysis of Case Studies ***

LATIN-AMERICA

The Indigenous Territory and Natural Park TIPNIS, Bolivia

(by Alexandra Tomaselli and Rainer Hofmann, with the contribution of Ebum Abolarin)

Bolivia has incorporated UNDRIP into its domestic legislation, with Law No. 3760 of 2007. The Territorio Indígena y Parque Nacional Isiboro-Secure (TIPNIS) is a recognized National Park, a demarcated Indigenous Communitarian Native Land, and home to approximately 60-70 indigenous communities. The construction of a highway that crosses TIPNIS in the middle began in June 2011. The project was approved without any prior consultation, and after two indigenous marches, a contested process of consultation was organized in late 2012. However, although the construction of the highway appeared to be blocked subsequently, the works in the first stretch continued. No compensation or redress mechanism for the affected indigenous communities is currently foreseen. Indigenous lawsuits in domestic courts so far have been declared inadmissible. Therefore, the TIPNIS case appears to be one of the clearest instances of misapplication of the right to consultation and to land of indigenous peoples in one country that apparently would have the best legal framework protecting these specific and all other indigenous peoples’ rights. In other words, this is a case in which all the legal guarantees were in place, but they were neither implemented nor respected, translating into a violation of a number of internationally recognized rules protecting the rights of indigenous peoples, including the rights to self-determination, autonomy or self-government, land rights, as well as the specific right according to which projects significantly impacting indigenous peoples’ rights and ways of life must not be carried out without their prior, free and informed consent. This is a flagrant violation not only of international law, but also of Bolivian domestic law, by virtue of the fact that – as previously mentioned – the adoption of Law No. 3760 of 2007 has attributed binding force to the whole UNDRIP as law of the country. As a consequence, in December 2015, Deputy Horacio Poppe Inch filed Supreme Decree No. 2298/2015 – which introduced the possibility for the administration to opt out of the consultation procedure with indigenous communities – with action of unconstitutionality before the Constitutional Court for alleged violation of several articles of the Constitution, of Articles 3, 5, 6 and 8 of ILO Convention 169, as well as of Articles 18, 19 and 40 UNDRIP.

National politics played and plays a large role in the road construction via the TIPNIS. Alternative routes would exist – and had been actually suggested from various parts – which would have preserved indigenous peoples’ rights without

³⁸ Ibid., Conclusion No. 10.

³⁹ See Article 37 UNDRIP.

⁴⁰ See Conclusion No. 9.

⁴¹ See ILA Committee on the Rights of Indigenous Peoples, “The Hague Conference (2010) Interim Report”, n. 1 above, p. 35.

⁴² Ibid., p. 43, quoting the *Indigenous Peoples’ Earth Charter*, Kari-Oka Conference, 25-30 May 1992, available at <<http://www.dialoguebetweennations.com/IR/english/KariOcaKimberley/KOCharter.html>> (accessed 21 May 2016), para. 56.

*** Each case study is presented in this section in an edited version based on the original studies written by the authors indicated under the title of each case. The work of editing has been carried out by the rapporteurs of the Committee, Federico Lenzerini and Timo Koivurova. The integral case studies are available on file with the respective authors as well as with the chairs and rapporteurs of the Committee. Some of them are available on the Committee’s web page, at <http://www.ila-hq.org/en/committees/index.cfm/cid/1048>

significantly affecting the government's development plans. In particular, the suggestion of constructing a railroad along the Park borders appeared to be very sustainable. This would be highly desirable, given that the construction of the highway without crossing in between an indigenous territory and a natural Park that is so rich in biodiversity would be clearly the best solution. The insistence on crossing the Park sadly suggests that the main reason behind this project is, in reality, to connect the coca fields in the area.

Land and Water Rights in Chile

(by Alexandra Tomaselli and Rainer Hofmann, with the contribution of Federico Lenzerini)

Chile has not yet granted constitutional recognition to the indigenous peoples that live within its borders. Thus, indigenous peoples in Chile enjoy the rights recognized in domestic legislation and more specifically in the Indigenous Law No.19.253 of 5 October 1993 (*Ley sobre Protección, Fomento y Desarrollo de los Indígenas*, but mainly known as *Ley Indígena*). However, in 2008 Chile ratified ILO Convention 169. This prompted a new debate on indigenous rights and a wave of initiatives aimed at further protecting indigenous peoples. Chile also voted in favour of the UNDRIP when the latter was adopted by the U.N. General Assembly in 2007.

This, however, did not eliminate the problems existing in Chile concerning the implementation of indigenous peoples' rights, particularly land rights. Indeed, indigenous water and land rights are particularly undermined in a country in which watercourses and underground natural resources represent vital aspects of the national economy. In 2009, the U.N. Special Rapporteur James Anaya underlined the problematic construction of hydro-electric plants and other environmentally hazardous projects on indigenous peoples' lands; the absence of general indigenous water rights; and, in a specific section, the issue of Mapuche land occupations followed by police repression. Furthermore, he stressed the need to adopt a procedure for the recognition of traditionally occupied land, an aspect also emphasized during the fifth human rights periodic review of Chile, and formally guaranteed by the Indigenous Law (Article 12.2).⁴³

As regards water rights, Article 64 of the above-mentioned Indigenous Law recognizes a special protection for the water rights of the indigenous peoples living in the North. However, in recent times the further desertification of the northern areas of Chile and the problems caused by the indefinite appropriation of water rights have prompted civil society organizations to insistently demand a reform of the Water Code (*Código de Aguas*). The main achievements in 2015 have been the works of the Commission for Hydric Resources and Desertification (*Comisión de Recursos Hídricos*) on the draft laws to reform the Water Code, which, *inter alia*, would establish, if approved, the recognition of the right to water as a human right, the prioritization of the use of water for human consumption, and the introduction of a 30-year limit for water concessions, thus eliminating permanent water rights. Against this background, since 2009 the Chilean Court of Appeals and the Supreme Court started to produce an extremely evolving and interesting jurisprudence regarding indigenous land and water rights, as well as their (related) right to consultation. In late 2009, the Chilean Supreme Court recognized the "ancestral water rights" of the Aymara indigenous community *Chusmiza y Usmagama*, basing its arguments on Articles 13.2 and 15.1 of the ILO Convention 169 (indigenous land as "habitat", which thus includes also the watercourses), also confirming that the reference to the indigenous territories in Article 64 of the Indigenous Law is not limited to registered properties, but also to those lands traditionally used by indigenous peoples. In the same period, in a case concerning the logging of native trees close to a land belonging to a Mapuche indigenous community, the Chilean Supreme Court condemned the logging company *Sociedad Palermo Ltda* for damages to Mapuche sacred sites and thus adverse effects to the practice of traditional medicine, on the basis of Articles 13-14 of ILO Convention 169 and other international instruments, including the Convention on Biological Diversity and the Convention on the Elimination of All Forms of Racial Discrimination. In mid-2010, the Court of Appeal of Valdivia found the Environmental National Commission guilty of waste allocation in the area contiguous to Mapuche lands and the consequent destruction of a ceremonial area, mentioning Articles 6.1.a, 6.2 and 7.1 of ILO Convention 169 and Article 25 UNDRIP; in particular, the Court stated that the indigenous peoples concerned should have been duly consulted, in good faith and according to the specific situation with the aim of reaching an agreement or their consent regarding the concerned measure. The Supreme Court upheld this decision in January 2011. In late 2014, the Supreme Court ruled in favour of the Peasant Community Diaguita of Huascoaltinos against the Environmental Evaluation Commission of the third region (Atacama), which had authorized the construction of an open-pit mine of gold and copper onto 2,463 hectares of land (including large parts of indigenous territories) without any (due) consultation with the affected indigenous peoples – in violation of Articles 6, 7 and 15 of ILO Convention 169.

The jurisprudence just examined may surely be framed as a good practice. Irrespective of whether the plaintiffs had directly claimed the application of the ILO Convention 169, which, as mentioned, had prompted an extensive debate within this country, the courts referred either to other provisions of this treaty or to other instruments, including the UNDRIP. Indeed, although relevant domestic law is far from matching the international standards, the Chilean domestic

⁴³ See James Anaya, "Informe del Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas", Human Rights Council, U.N. Doc. A/HRC/12/34/Add.6 of 5 October 2009.

courts *completed* the understanding and the application of the domestic protection of indigenous water and land rights *via* the reference to the international standards. Indeed, the practice of Chilean courts appears to be consistent with the standards set by the UNDRIP, particularly with articles 20 (right of indigenous peoples to be secure in the enjoyment of their own means of subsistence and development), 25 (which explicitly refers to waters), 26 (land rights) and 32.2 (consultation, cooperation, prior free and informed consent with respect to any project affecting their lands or territories and other resources, including water). It may be reasonably argued here that the Chilean case law may potentially positively influence international standardization of the application of indigenous water and land rights, as the evolving jurisprudence developed by Chilean courts may contribute to the fine-tuning of the content and the application of indigenous water and land rights in other parts of the world.

Gas of Camisea in Territories of Indigenous Peoples in Isolation: Gaps in Legislation and Obligations of Peru

(by Gloria Huamán Rodríguez and René Kuppe)

The Lower Urubamba area in the south-eastern part of the Peruvian Amazon has been inhabited for immemorial times by peoples who live far from any contact with today's dominant society. Those nomad peoples are on the move through vast stretches of ancestral territories in search of resources for their subsistence. In the 1980's, the Peruvian government initiated one of its most ambitious projects called Gas of Camisea, for which it has issued licenses in favour of transnational companies for exploration and exploitation of this hydrocarbon precisely in territories inhabited by peoples in voluntary isolation. Since 1996 this project has gained huge support by political leaders, and is seen as one of the engines for economic growth in the country. It is said to have a number of advantages, ranging from industrial development to the fact of satisfying the needs of social projects and national energy demand.

During the development of the Camisea project, several groups who used to live in isolation have been forcibly contacted by workers of Camisea and others that took advantage of the lack of clear protection norms – causing serious suffering of chronic diseases and a high death toll. The establishment of a weak territorial reserve – an area where indigenous peoples live voluntarily in isolation in order to use their natural resources – has not changed the serious effects of an invasive industry. Far from recognizing these peoples' right to their ancestral territories, the Peruvian State has approved new exploration and exploitation activities for hydrocarbons in Block 88, which is superimposed to the territorial reserve meant for the Kugapakori, Nahua, Nanti and other peoples living in isolation, producing an imminent danger of extinction for these peoples. In addition, the central government has irregularly given its approval to an expansion of the project which allows the consortium to open frontlines of exploration of new gas fields inside the territorial reserve. Even the adoption of *Law 28736 on the Protection of Indigenous and Original Peoples in situation of isolation or initial contact* in May 2006 has not had any significant impact, as this law has introduced the concept of "indigenous reserves", which have access to special protection only pursuant to official recognition on the basis of an administrative process, and so far the Peruvian state has not established a single indigenous reserve.

The Peruvian state is clearly not fulfilling its international obligations to protect, respect and guarantee the human rights of indigenous peoples living in isolation. In order to comply with existing international standards, the immediate response which should be given by the State in this situation would be to declare the whole areas inhabited by indigenous peoples in isolation since time immemorial as *intangible territories* or *protected territorial reserves*, and to establish buffer zones around the said territories which would prevent third parties from entering, consistent with the *Guidelines for the Protection of Indigenous Peoples in Isolation and Initial Contact in the Amazon Region, the Gran Chaco and the Eastern Region of Paraguay*.⁴⁴ The intangibility of this territory is not a particular right of indigenous peoples in isolation, but the most appropriate measure to achieve the ends of the UNDRIP and other relevant international rules as well as to implement a number of general indigenous human rights, like the right to life, cultural survival, and rights to health, food security and use of territories and resources. It is to be noted that Peru ratified ILO Convention 169 in 1994,⁴⁵ but has never opened consultation with the affected indigenous peoples during the different steps of the Camisea project. Neither ILO Convention 169 nor the UNDRIP make any specific references to the protection of the rights of indigenous peoples in isolation. However, as a matter of fact, we have to consider how human rights rules and standards protecting indigenous peoples in general are relevant for isolated peoples, especially considering their particular situation of high vulnerability. On the other hand, it is obvious that the right to consultation cannot be easily put into practice when it comes to isolated indigenous groups, as establishing physical contacts with them would endanger their health and undermine their current independent political and social situation. However, their opinion on the issue should be quite explicit, as it is freely expressed through maintaining their isolation, and, as such, it should be respected. This

⁴⁴ Result of the consultations by the UN Office of the High Commissioner for Human Rights in the region: Bolivia, Brazil, Colombia, Ecuador, Paraguay, Peru, and Venezuela, May 2012, available (in Spanish) at <<http://acnudh.org/wp-content/uploads/2012/03/Directrices-de-Proteccion-C3%B3n-para-los-Pueblos-Ind%C3%ADgenas-en-Aislamiento-y-en-Contacto-Inicial.pdf>> (accessed 26 May 2016), para. 53(a).

⁴⁵ See n. 22 above.

notwithstanding, at present the project Camisea continues to be carried out, even if it is performed in blatant violation of internationally recognized rights of indigenous peoples.

Burlington Resources Inc. v. Ecuador/Kichwa Indigenous People of Sarayaku v. Ecuador

(by Christina Binder, with the contribution of Jane A. Hofbauer[±])

The case of *Burlington v. Ecuador* represents a unique example of the triangular relationship between investors, States and indigenous communities, and has been investigated both from an investment law and human rights perspective. It thus bears particular relevance in delineating the scope of the rights and obligations of the respective parties in the context of resource development projects/foreign investments which have an impact on indigenous communities. Moreover, it also constitutes an example of the overlapping of different judicial bodies and non-judicial forums regarding a particular set of facts. While in theory this should increase the level of protection offered to the affected (indigenous) communities, difficulties arise due the specific mandates of the respective bodies and their treatment of the absent third party as an “externality” to the proceedings.

Article 57 of the amended 2008 Constitution of Ecuador accords a broad range of rights to indigenous peoples, including, at para. 7, a right to “free, prior and informed consultation within a reasonable period of time, on the plans and programs for prospecting, producing and marketing non-renewable resources located on their lands and which could have an environmental or cultural impact on them”. This notwithstanding, disparities continue to exist particularly with regard to the right to free, prior and informed consultation in the context of hydrocarbons, which has been implemented through Executive Decree 1247,⁴⁶ understanding the goal of the consultation process to be participation and not consent. A further concern relates to the matter of drafting of said decree, as indigenous communities were not consulted about the law itself, and to the envisioned outcome as “any agreements which may be reached must be based on pre-existing public policy measures”.⁴⁷

The facts of the case of *Burlington v. Ecuador* were investigated by, first, an ICSID arbitral tribunal and, subsequently, the IACtHR. The *Burlington Resources* award by the ICSID arbitral tribunal⁴⁸ in the end dismissed Burlington Resources’ claims that Ecuador had failed to provide full protection and security to its investment against the violent resistance by the affected indigenous groups on procedural grounds, and thus did not assess whether indigenous interests had any role to play on substantive issues. The IACtHR reached a landmark judgment in 2012 with regard to the rights of indigenous peoples in the context of resource exploitation projects.⁴⁹ The Court emphasized that, in order for the requirement of effective participation to establish a true dialogue between the parties and be based on mutual trust, it was essential to remember that consultations had to be carried out in good faith, i.e. in “absence of any form of coercion by the State or by agents or third parties that act with its authority or acquiescence.”⁵⁰ It also pointed out that this meant that practices which attempted to “undermine the social cohesion of the affected communities, either through corruption of community leaders or by establishing parallel leaders, or through negotiations with individual members of the community that are contrary to international standards”,⁵¹ were incompatible with good faith requirements. Finally, it reminded the parties that “the obligation to consult is the responsibility of the State; therefore the planning and executing of the consultation process is not an obligation that can be avoided by delegating it to a private company or to third parties, much less delegating it to the same company that is interested in exploiting the resources in the territory of the community that is the subject of the consultation”.⁵² The IACtHR concluded that Ecuador violated rights recognized in the American Convention on Human Rights – particularly through violating the rights to consultation, to indigenous communal property and to cultural identity (Article 21 of the Convention), as the project directly affected the territory of the Kichwa – and ILO Convention 169. In addition, the Court recalled several times the UNDRIP as a source of applicable standards in the field, including as instrument “particularly relevant to the recognition of the right to cultural identity of indigenous peoples”.⁵³ In light of its findings, the IACtHR ordered Ecuador to pay \$1.4 million compensation for pecuniary and non-pecuniary damages, and consult with the Sarayaku people on the removal of the remaining explosives on the territory of the Sarayaku as well as on any type of investment or development plan with potential repercussions for their territory or affect essential aspects of their worldview or life, integrity or cultural identity. Moreover, Ecuador was ordered to adopt legislative or other measures to give full effect to the right to prior consultation of indigenous peoples as well as make a public

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⁴⁶ Reglamenta para la ejecución de la consulta previa libre e informada en los procesos de licitación y asignación de áreas y bloques hidrocarburíferos, 19 July 2012.

⁴⁷ CESCR, Concluding observations of the Committee on the third periodic report of Ecuador as approved by the Committee at its forty-ninth session (14-30 November 2012), 13 December 2012, U.N. Doc. E/C.12/ECU/CO/3 of 13 December 2012, para. 9.

⁴⁸ *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010.

⁴⁹ See *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Series C No. 245, Judgment of 27 June 2012.

⁵⁰ *Ibid.*, para. 186.

⁵¹ *Ibid.*

⁵² *Ibid.*, para. 187.

⁵³ *Ibid.*, para. 215.

acknowledgement of its international responsibility. At the moment of this writing, the implementation by Ecuador of the Court's judgment has only been partial, as the government has only paid compensation and issued an official apology, which is troubling in particular regarding the obligation to ensure with legislative or other measures that the international standard of the right to consultation is put into effect. Furthermore, to date the majority of the explosives have not been removed from the Sarayaku territories.

The *Sarayaku* proceedings serve as yardsticks for the protection of indigenous rights in several aspects. In particular, the inclusive procedure exemplified in this case is certainly a promising example for future proceedings dealing with indigenous rights. On a substantive level, the IACtHR observations relating to the content of the consultation process, especially its detailing of the good faith requirement and its emphasis on clarifying that the obligation is a direct responsibility of the state which cannot be delegated to private parties interested in resource exploitation activities, are particularly noteworthy. This comes not only as a direct response to the facts at hand but as a general response to the common problems arising in the context of operationalizing the principle of free, prior and informed consultation/consent.

The Decision by the Inter-American Court of Human Rights concerning the Awas Tingni vs. Nicaragua Case (2001): The Implementation Gap

(by *Felipe Gómez Isa*)

In August 2001, the IACtHR issued a landmark and pioneering decision in the field of indigenous peoples' human rights law with the Awas Tingni judgment.⁵⁴ As is well-known, the ruling of the IACtHR in this case soon gained the value of precedent in recognizing that the interpretation of the right to property established in Article 21 of the American Convention on Human Rights includes the communal forms of property of ancestral lands common among indigenous communities. However, while the huge significance of the judgment in point is undeniable, its implementation by the government of Nicaragua has been long and tortuous.

As stated in the Court's judgment, the State of Nicaragua had to "adopt the legislative, administrative, and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores".⁵⁵ In the specific case of the Awas Tingni community, the Court granted the State 15 months to "carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Awas Tingni Community [...] with full participation by the Community and taking into account its customary law, values, customs and mores".⁵⁶

There have been various stages in the implementation of the judgment in various respects. One of the main difficulties has concerned recognition, demarcation and titling of the land rights of the indigenous community. There have been a clear lack of resources and delays in the implementation process. The major progress occurred in December 2008, when – once the work of measuring and marking out the indigenous territory was successfully completed – the community was awarded the title to their ancestral lands and that title was registered. It was the *Comisión Nacional de Demarcación y Titulación (CONADETI)* which, pursuant to Law 445 (2003), issued the Communal Title Deed No. 007-13-12-2008 relating to the AMASAU territory (*Awas Tingni Mayangnina Sauni Umani*) on 13 December 2008.

However, the last stage of the process of demarcation and titling, involving the title clearance in relation to the third parties located within them, has proved particularly problematic. Title clearance was intended to identify and characterise the presence of third parties within indigenous territories in an attempt to reach a solution that was compatible with the exercise of the territorial rights by indigenous peoples, but the title clearance process was hampered by the lack of coordination between the institutions. As a consequence, the absolute lack of title clearance is paving the way to the invasion of the indigenous territories by settlers through violence, displacement and destruction of indigenous property. It is to be recognized that it is objectively difficult for a country like Nicaragua to properly implement a judgment like the one in discussion, especially when it leads to big changes (like the Awas Tingni judgment actually does). In any event, even if there are serious problems in implementing the judgment in point, it has nevertheless greatly empowered the indigenous community to defend its land rights. The very process leading to the Court's judgment has represented an essential tool for the empowerment of the community. The judgment in itself was of paramount importance for a number of reasons: first, the evolutionary interpretation of the IACtHR in the Awas Tingni case set a *very promising precedent* for the evolution of the right of indigenous peoples to their lands and natural resources in international law, followed by the Court in its subsequent jurisprudence;⁵⁷ secondly, it recognized the collective dimension of indigenous peoples' land rights, as well as that "the close ties of indigenous people with the land must be recognised and understood as the

⁵⁴ See *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, n. 29 above.

⁵⁵ *Ibid.*, para. 164.

⁵⁶ *Ibid.*

⁵⁷ See n. 29 above.

fundamental basis of their cultures, their spiritual life, their integrity and their economic survival”;⁵⁸ thirdly, the Court emphasized that the legal basis of indigenous peoples’ land rights is not grounded on the recognition by the State, but on the customary practices of indigenous communities; last but not least, in one stage of the implementation of the judgment – particularly in Recital III of the Communal Title Deed awarding communal title deed in favour of the Awas Tingni – the legal grounds used to argue the relevance for that title to be issued included a reference to the UNDRIP, in particular to the provisions concerning the right of indigenous peoples to their lands, territories and resources. In sum, despite the enormous difficulties that the Awas Tingni have faced in the implementation process of the IACtHR judgment, it must be acknowledged that the Court’s decision has paved the way for very progressive developments in terms of indigenous peoples’ rights to their lands and territories, and a degree of empowerment for the indigenous peoples themselves in defence of their rights. On the other hand, however, there is a huge gap between, on one side, the formal recognition of indigenous peoples’ rights and, on the other, the stark reality still faced every day as part of an unbridled struggle for access to natural resources. In this respect, it is to be noted, among other things, that the Inter-American human rights system should be improved especially through establishing some specific effective mechanisms to favour the implementation process of the IACtHR decisions.

The Maya Communities in Belize

(by *Federico Lenzerini* and *Siegfried Wiessner*)****

More than thirty villages belonging to Maya Communities are scattered throughout Southern Belize, connected with each other through gravel roads and forest trails. For more than twenty years the Maya in Belize have been fighting for preserving their traditional lands, after the government of Belize, in the mid-1990s, had granted logging concessions and oil exploration licences over parts of their lands in the Toledo District. In particular, in 1994, the government converted almost 42,000 acres of the Maya ancestral territory into government land, establishing the Sarstoon-Temash National Park (STNP), without consulting the community. The government subsequently opened the STNP to oil exploration and drilling by US Capital Energy Belize, Ltd, a wholly owned Belizean subsidiary of the American company US Capital Energy, Inc. Starting from 2004, the Maya Communities achieved a series of judicial victories in front of the Inter-American Commission on Human Rights as well as of various national courts. This notwithstanding, the government of Belize continued to pursue its plans of economic exploitation in the areas where the Maya territories are located. For this reason, the Maya brought their case in front of the Caribbean Court of Justice (CCJ), where the community obtained another landmark victory.

In 2004 the Inter-American Commission on Human Rights found that the government of Belize – by granting logging and oil concessions in the Maya lands and otherwise failing to adequately protect them and to recognize and secure the territorial rights of the Maya people in those lands, as well as by failing to afford the Maya people judicial protection of their rights and interests in the lands – violated a number of provisions of the 1948 *American Declaration of the Rights and Duties of Man*.⁵⁹ In particular, the said behaviour violated the right to property enshrined in Article XXIII, the right to equality before the law, to equal protection of the law, and to non-discrimination provided for by Article II, as well as the right to judicial protection enshrined in Article XVIII of the Declaration.⁶⁰ The Commission consequently ordered the government of Belize to adopt “in its domestic law, and through fully informed consultations with the Maya people, the legislative, administrative, and any other measures necessary to delimit, demarcate and title or otherwise clarify and protect the territory in which the Maya people have a communal property right, in accordance with their customary land use practices, and without detriment to other indigenous communities”; to carry out “the measures to delimit, demarcate and title or otherwise clarify and protect the corresponding lands of the Maya people without detriment to other indigenous communities”; and to repair “the environmental damage resulting from the logging concessions granted by the State in respect of the territory traditionally occupied and used by the Maya people”.⁶¹

In 2007, in a landmark judgment in the consolidated cases of *Aurelio Cal et al. v. Belize*, the Supreme Court of Belize ordered the government of Belize to officially declare that the claimant Maya villages and their members hold, respectively, “collective and individual rights in the lands and resources that they have used and occupied according to Maya customary practices and that these rights constitute ‘property’ within the meaning of [...] the Belize Constitution”, as well as that the boundaries of the said lands are those “established through Maya customary practices”. In addition, the Court ordered the government to demarcate the lands concerned and provide official documentation of Maya property title, as well as to defend the community from external interferences – either by agents of the government itself or third

⁵⁸ See *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, n. 29 above, para. 149.

**** The authors gratefully acknowledge Mr. José David Quiñones Villegas, from Colombia, LL.M. University of Siena (Italy), for his valuable help in the research for this case-study.

⁵⁹ The text of the Declaration is available at <<https://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>> (accessed 26 May 2016).

⁶⁰ See Report N° 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District v. Belize*, 12 October 2004, available at <http://www.law2.arizona.edu/depts/iplp/outreach/maya_belize/documents/BelizeFinalRpt.pdf> (accessed 26 May 2016), para. 192 ff.

⁶¹ *Ibid.*, para. 197.

parties – threatening their property rights.⁶² The Chief Justice, in elaborating on his finding of a violation of customary international law, stated that the UNDRIP, “embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it”. “The United Nations, its bodies and specialized agencies including at the country level, and states, are enjoined to promote respect for and full application of the Declaration’s provision and to follow up its effectiveness”.⁶³ The Supreme Court ruled in favour of Maya communities again in 2010,⁶⁴ and, in 2014, finally affirmed that the decision of the government of Belize to allow oil drilling and road construction in the STNP was irrational and unreasonable, “that decision having been made without the free, prior and informed consent of the indigenous Maya communities”. In addition, it held that the government has an *obligation* under the UNDRIP “to respect the rights of the Indigenous Maya Peoples to their lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”.⁶⁵ In the meantime, in 2013, the Court of Appeal affirmed the decision of the Supreme Court that Maya customary land tenure existed in all Maya villages in the Toledo District of southern Belize, as well as that it constituted property within the meaning of the Constitution of Belize. However, the Court of Appeal also held that there had been no violation of any constitutional guarantees by the government and, consequently, that the issue of constitutional relief did not arise.⁶⁶ For this reason, the Maya brought their case before the CCJ.

The Caribbean Court released its judgment on 30 October 2015.⁶⁷ The Court assessed the issue of damages for breach of the Maya community constitutional rights under three separate heads: (1) protection against arbitrary deprivation of property; (2) right to equality and non-discrimination; and (3) right to protection of the law. The CCJ failed to find a breach of the right to the protection against arbitrary deprivation of property under the Constitution of Belize, because the nature of the Appellants’ property rights and the entitlement flowing therefrom are yet to be precisely defined. The Court also dismissed the equality and non-discrimination claim, on the basis that there was no evidence of discriminatory treatment of the Appellants based on race or ethnicity. However, the Court held that the Maya community right to the protection of the law had been breached, due to “the failure of the Government of Belize to recognize and protect Maya customary land tenure rights”.⁶⁸ In this respect, the Court noted that “the right to protection of the law encompasses the international obligations of the State to recognize and protect the rights of indigenous people. A recognized sub-set of the rule of law is the obligation of the State to honour its international commitments”.⁶⁹ The Court added that “[i]t is beyond dispute that international law recognizes and protects the rights of indigenous peoples”,⁷⁰ and, referring to the UNDRIP specifically, emphasized that, while it is not binding in itself, it is “relevant to the interpretation of the Constitution of Belize which in its preamble explicitly recognizes that state policies must protect the culture and identity of its indigenous peoples but also must promote respect for international law and treaty obligations”.⁷¹ In conclusion, the CCJ resolved that the decision of the Court of Appeal on the issue of damages be reversed, and that the Maya community be awarded moral damages for violations of their right to maintain their customary land tenure. It consequently ordered the Government of Belize to establish a fund of BZ\$300,000.00 as a first step towards compliance with its undertaking to protect Maya customary land tenure, as well as to pay 75% of the appellants’ costs.

The decision of the CCJ reinforces the recognition of indigenous peoples’ rights to their traditional lands under their customary land tenure systems, as well as the right to moral damages, i.e. reparations for violations, serving as key example of the implementation of international collective rights of indigenous peoples in municipal law, in this case on the level of constitutional law.

⁶² See Claims 171 and 172 of 2007, *Aurelio Cal et al v. Attorney General of Belize*, 18 October 2007, available at <http://www.law2.arizona.edu/depts/ippl/outreach/maya_belize/documents/ClaimsNos171and172of2007.pdf> (accessed 26 May 2016), para. 136. On this case see S.J. Anaya, “Reparations for Neglect of Indigenous Land Rights at the Intersection of Domestic and International Law – The Maya Cases in the Supreme Court of Belize”, in F. Lenzerini (ed.), *Reparations for Indigenous Peoples. International and Comparative Perspectives*, Oxford, 2008, p. 567.

⁶³ *Ibid.*, para. 132.

⁶⁴ See Claim No. 366 of 2008, *The Maya Leaders Alliance et Al. v. The Attorney General of Belize et Al.*, 28 June 2010, available at <http://www.law2.arizona.edu/depts/ippl/outreach/maya_belize/documents/Claim%20366%20of%202008.pdf> (accessed 26 May 2016).

⁶⁵ See Claim No. 394 of 2013, *Sarstoon Temash Institute for Indigenous Management et. Al. v. The Attorney General of Belize et Al.*, 3 April 2014, available at <<https://www.elaw.org/system/files/bz.claim394of2013.satiim.pdf>> (accessed 26 May 2016), para. 19.

⁶⁶ See Civil Appeal No. 27 of 2010, *The Attorney General of Belize et Al. v. The Maya Leaders Alliance et Al.*, 25 July 2013, available at <https://www.elaw.org/system/files/civil_appeal_no_27_of_2010_-_attorney_general_of_belize_et_al_and_maya_leaders_alliance_et_al.sma-1.pdf> (accessed 26 May 2016).

⁶⁷ See CCJ Appeal No BZCV2014/002, BZ Civil Appeal No. 27 of 2010, *The Maya Leaders Alliance v. The Attorney General of Belize*, 30 October 2015, [2015] CCJ 15 (AJ).

⁶⁸ *Ibid.*, para. 58.

⁶⁹ *Ibid.*, para. 52.

⁷⁰ *Ibid.*, para. 53.

⁷¹ *Ibid.*, para. 54.

Indigenous Rights and Extractivism in Argentina

(by *Marzia Rosti*[¶])

The second half of the 20th century has represented perhaps the most important, long-awaited moment for the indigenous peoples in Argentina, because the country aligned itself with the policies adopted by the other Latin American countries in relation to indigenous rights during the same period. In particular, new Article 75.17 of the Constitution, introduced in 1994, lists a large catalogue of indigenous rights, including the right to collective ownership of the lands traditionally occupied, participation in managing the natural resources present in those territories and the right to a bilingual and intercultural education. This provision is supplemented by some very significant legislative acts increasing the level of protection of indigenous peoples' rights in the country. Argentina ratified ILO 169 Convention in 2000⁷², and the government voted in favour of the UNDRIP on the day of its adoption by the U.N. General Assembly, on 13 September 2007.

As just noted, in Argentina land rights of indigenous peoples are constitutionally protected. However, the increase in territorial claims stimulated a number of initiatives at the provincial level to regulate possession of the land, which on their turn led to the development of a case law in the context of which, while the courts sometimes ruled in favour of the indigenous communities, they proved to be quite reluctant to acknowledge that the fact of being indigenous entitled indigenous communities to specific rights. In addition, the profound political, economic and social crisis experienced by the country during 2001-2002 led the government, in order to revive the country, to promote the production and export of agricultural products and the exploitation of natural resources, in particular gas and crude oil, first of all to satisfy the domestic energy requirements. The success of the *modelo extractivista* allowed the penetration of extractive activities into areas of the country which had previously remained excluded or almost excluded from exploitation projects, including traditional territories of indigenous communities, with a resulting increase in tensions, which frequently degenerated into episodes of violence. This led to the evacuation of many indigenous communities from their traditional lands and allowed "extraction industries" to have access into indigenous territories, with the complicity of political institutions, while movements of protest by indigenous peoples were criminalized. On the other hand, however, some of the controversies triggered by this situation have led to the victory of the indigenous communities concerned and to recognition of their land rights by domestic courts. It is the case, for example, of the dispute between the Wenctru Trawel Leufu Community and the Empresa Petrolera Piedra de Aguila, concerning a license granted to the latter to perform exploration activities and to exploit the hydrocarbon resources in the area inhabited by the community. Indeed, in 2011, a local court ordered the operations in the indigenous territory to be suspended. This decision was confirmed on 6 December 2012 by the Tribunal Superior de Justicia di Neuquén, which rejected the appeal submitted by the oil company and by the Fiscalía de Estado and acknowledged the existence of the indigenous settlement and, therefore, the obligation to respect indigenous rights.

In conclusion, it is to be noted that in Argentina, in some cases, the complicity among the national or local institutions and the extraction companies has led to a denial of indigenous peoples' land rights, in violation of both national legislation and pertinent international standards. In other cases, however, national courts have followed the opposite approach, ruling in favour of indigenous rights. This recently happened, for instance, with a judgment by the Corte Suprema de Justicia de la Nación (CSJN), issued on 10 November 2015, which upheld the Recurso Extraordinario Federal submitted by the Las Huaytekas community of Río Negro against the precautionary measure that ordered the evacuation from its territory and recognized the evidentiary value of the "relevamiento técnico-jurídico-catastral", in line with Article 14.2 of ILO Convention 169, establishing that governments "shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession". It is to be hoped that in the near future the attention recently shown by courts with regard to indigenous peoples' land rights will consolidate, as well as that the government will be able to reconcile the objectives of economic growth with its international obligations regarding indigenous peoples.

The Implementation of IACtHR Judgments Concerning Land Rights in Suriname: *Saramaka People V. Suriname* and Subsequent Cases

(by *Anna Meijknecht, Bas Rombouts* and *Jacintha Asarfi*[¶])

In recent years, the IACtHR has issued two very significant judgments concerning indigenous and tribal peoples' land rights in Suriname.

First, in the leading *Saramaka* case,⁷³ the IACtHR reaffirmed the right to communal property under Article 21 of the American Convention on Human Rights for tribal peoples, by stating that "the Court's jurisprudence regarding indigenous people's right to property is also applicable to tribal peoples because both share distinct, social, cultural, and economic

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⁷² See n. 22 above.

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⁷³ See *Case of the Saramaka People v. Suriname*, n. 29 above.

characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival”.⁷⁴ The Court, taking into account Article 32 UNDRIP, significantly added that, “[r]egarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions”.⁷⁵ The Court concluded that Suriname had violated the property rights of the members of the Saramaka people recognized in Article 21 of the Convention and ordered the respondent government to delimit, demarcate and grant the community collective title over the territory in accordance with their customary laws, and through previous, effective and fully informed consultations with the Saramaka people, as well as to ensure the full exercise and enjoyment of their right to communal property through adopting all the necessary legislative, administrative and other measures to this end.⁷⁶ Additionally, the Court ordered the State to take measures of satisfaction, such as translating the judgment in Dutch and publishing it in the State’s Official Gazette and one daily newspaper as well as financing the broadcasts of several paragraphs in the *Saramaka* language. The material and immaterial damages were also awarded, through, respectively, granting a compensation of US\$ 75.000,00 and allocating US\$ 600.000,00 for a community development fund.⁷⁷

The second case at issue concerned the Kaliña and Lokono people.⁷⁸ In its judgment, released in November 2015, the IACtHR followed the same reasoning of the *Saramaka* judgment, by declaring that the State has to grant the Kaliña and Lokono peoples legal recognition of collective juridical personality, delimit and demarcate the traditional territory of the members of the communities concerned, grant them collective title to that territory and ensure their effective use and enjoyment thereof, as well as create a community development fund to their benefit.⁷⁹

Finally, another similar case is at present pending before the Court. It concerns the Kaliña indigenous community of Maho and the Association of Indigenous Village Leaders in Suriname, who filed a complaint to the Inter-American Commission on Human Rights on 16 December 2009, claiming that the government of Suriname has granted concessions and permits to third parties to allow them to exploit the land, territory and natural resources traditionally occupied and used by the community.⁸⁰ The petition was declared admissible by the Inter-American Commission on Human Rights on 19 March 2013.

So far, a number of obstacles have hampered the full implementation by Suriname of the *Saramaka* judgment. Considering the innovative character of the Courts’ rulings concerning indigenous land rights, it is plausible that their practical implementation on national level takes some time. However, almost ten years have passed since the *Saramaka* judgment and the government of Suriname has still not managed to fully implement any of the substantive parts of the ruling. Among other things, it has been unable to provide the legislative basis for recognising and securing indigenous and tribal rights in Suriname, notwithstanding international expertise offered by the U.N. Special Rapporteur on the Rights of Indigenous Peoples, several detailed monitoring compliance reports by the IACHR, involvement of the CERD Committee and other States and even the submission to the State for its consideration of several draft laws on indigenous and peoples’ rights drafted by indigenous and tribal peoples and their organisations. The ongoing lack of full compliance with the Courts’ ruling affects the physical and cultural survival of the Saramaka indigenous communities, as well as the environment and natural resources in the areas concerned. Moreover, it undermines the trustworthiness of the State and creates repetitive cases – the case of the *Kaliña and Lokono* people and the *Maho Indigenous Community* case. All three cases reveal a structural problem involving a lack of recognition in domestic law of the juridical personality and right to collective property of indigenous and tribal peoples in Suriname. Furthermore, they reveal the lack of strong compliance mechanisms within the Organization of American States system; indeed, in case of failure to comply with the IACtHR judgments in contentious cases of breach of the American Convention on Human Rights or the Court’s order of provisional measures, there are no effective tools to enforce sanctions.

A positive development, though, seems to be a growing alertness within the government that the development of measures necessary to implement the judgments will have to be done in dialogue with the people concerned. This development can be discerned, for instance, by the fact that the State and the Maho Indigenous Community are in the process of a friendly settlement and that the State of Suriname has communicated to the Inter-American Commission that it is in favour of finding a solution for the land rights issues and to hold a dialogue with the Maho Indigenous Community.

The Case of the Hydroelectric Plant of Belo Monte in Brazil

⁷⁴ Ibid., para. 86.

⁷⁵ Ibid., para. 134.

⁷⁶ Ibid., para. 194.

⁷⁷ Ibid., paras. 195-196.

⁷⁸ See *Case of the Kaliña and Lokono Peoples v. Suriname*, Series C No. 309, Judgment of 25 November 2015.

⁷⁹ Ibid., paras. 5-11.

⁸⁰ Report No. 9/13, Petition 1621-09, Admissibility *Maho Indigenous Community v. Suriname*, 19 March 2013, p. 1.

(by *Rafael Soares Leite*)

Belo Monte is a hydroelectric plant, qualified as a mega structure project that has been built in the Xingu River in the Amazon in the state of Pará. The plant was planned as an expansion of Brazilian energy matrix, which is highly dependent on hydropower. Since the very beginning of the construction of the plant, it has been subject to criticism by both environmentalists and traditional communities that live off the surrounding natural resources. Even though the implementation of the dam project is well advanced, its completion is expected in 2019. The environmental impact studies date from 2007, and the granting of the concession occurred in 2010. In terms of development for the country, it is estimated that the plant, with the installed capacity of 11.233,1 megawatts, will be able to supply energy for 60 million people, or approximately 18 million households.

At present, there are many lawsuits being considered that are related to the implementation of the hydroelectric dam. In addition to indigenous disputes and conflicts of an environmental kind, there have recently been allegations of fraud and corruption involving parties that support the government, linking those crimes to the Belo Monte concession. In particular, the failure to implement the necessary conditions for ensuring appropriate protection of the traditional lands of the communities concerned has threatened the very survival of the indigenous peoples affected by the project. Furthermore, a licence has been issued for the Belo Sun gold mining project in close proximity to the Belo Monte dam, in the absence of consultation and the lack of a cumulative assessment of environmental, social and human rights impacts on indigenous peoples.

The case is now under international scrutiny by the Inter-American Commission on Human Rights. On 1 April 2011 the IACHR granted precautionary measures in favor of the indigenous communities of the Xingu River basin, with the purpose of safeguarding the life and personal integrity of those people, affected by the construction of the Belo Monte hydroelectric plant.⁸¹ The Commission suggested many provisional measures to the Brazilian government, including the suspension of works related to Belo Monte. The Brazilian government did not receive well this decision, and reacted by adopting severe diplomatic measures. The case is still pending.

In addition to the Inter-American Commission, the case is under scrutiny by domestic courts. There are many lawsuits related to the Belo Monte hydroelectric dam construction, and one of the most important is registered under n. 2006.39.03.000711-8/PA. In this case, the object of litigation is about the observance of the obligation to consult the affected indigenous communities before the deliberation by the Brazilian state about the concession and construction of the hydroelectric plant. The Federal Public Prosecution Body, as a plaintiff in the case, required the discontinuation of the construction of the plant as long as the indigenous communities are not consulted. It also disputed the legal validity of the Legislative Decree n. 788/2005, which authorized the federal government to implement the water use of Belo Monte in the Xingu river, since it was approved without consulting with the communities and without carrying out environmental impact studies.

Important background for this case is the leading case of the demarcation of *Raposa-Serra do Sol*.⁸² Even though the Brazilian Constitution was enacted in 1988, it took almost twenty years for the Supreme Court to pronounce a judgment that would develop relevant standards for the interpretation of indigenous peoples' constitutional rights. The case of the demarcation of Raposa-Serra do Sol gave rise to a controversial decision, in so far that, while recognizing the importance of indigenous peoples' rights, the judgment seemed to subordinate such rights to other interests. For example, the Supreme Court held that, in the case of an indigenous land that is also a natural protected area, the federal environmental agency is responsible for the administration of the land.

The Case of the Hydroelectric Plant of São Luiz do Tapajós in Brazil

(by *Rafael Soares Leite*)

The Tapajós hydroelectric project relates to the government's intention to build a dam in a river located in the Tapajós basin, in Brazil. The project is still on paper and the execution has not started yet. When the Munduruku – the indigenous people living in the concerned area – learned about the government's movements, they started mobilizing to ensure that ILO Convention 169 and the Federal Constitution be respected, especially the provisions related to participatory rights.

The hydroelectric plant of the São Luiz do Tapajós is supposed to produce up to 8,000 megawatts with the flooding of a total area of 729 square kilometers after the construction of the reservoir. Besides the legal requirements from the perspective of indigenous peoples' rights, there are also some legal procedures required by environmental law. Mainly, for the construction of the dam, it is also necessary for the project to obtain the environmental permit.

From the indigenous point of view, the flooded area would extend to 17,000 hectares of the indigenous territory Sawré Muybu, attributed to the Munduruku people. It must be noted that this area has not been demarcated yet, an element

⁸¹ See <<http://www.cidh.oas.org/medidas/2011.port.htm>> (accessed 26 May 2016).

⁸² Reference by the Supreme Federal Court standards: Pet 3388, Relator(a): Min. Carlos Britto, Tribunal Pleno, 19 March 2009.

which distinguishes this case from the one of Belo Monte. The lack of consultation and the absence of demarcation of indigenous lands impacted by the Tapajós dam complex has been noted in the End of Mission Statement of 17 March 2016 by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz, on her visit to Brazil.⁸³

What makes the Tapajós case unique is the active participation of the indigenous peoples through two distinct but interrelated instruments: the so called “self-demarcation of land” and the consultation protocol. The self-demarcation of indigenous land Sawré Muybu was proposed by the Mundurucu after government delay in the official demarcation. This delay is seen with suspicion by the Mundurucu, since the recognized area would be flooded if the hydroelectric plant of São Luiz do Tapajós is implemented. This raises a very important question: what do the Mundurucu people expect to achieve with the self-demarcation and how does it impact official decision making about the São Luiz do Tapajós? Another initiative attributed to the Tapajós case is the formulation of a “consultation protocol”, determining the terms according to which, how and when the Mundurucu should be consulted. This is also of fundamental relevance in understanding the implementation of indigenous peoples’ rights, since this was supposedly based on ILO Convention 169 and affects the economic rights of the Mundurucu.

Like for the case of the hydroelectric plant of Belo Monte, the leading case of the demarcation of *Raposa-Serra do Sol*⁸⁴ represents an important background for the São Luiz do Tapajós case as well.

NORTHERN AMERICA

***Glamis Gold Ltd. (Claimant) v United States of America (Respondent)*, NAFTA/UNCITRAL Award, 8 June 2009**

(by Christina Binder, with the contribution of Jane A. Hofbauer)

The *Glamis Gold* award (2009)⁸⁵ is one of the recent investment awards touching upon indigenous rights and may be considered a symbolic example of the clash between investors’ rights and cultural heritage protection. This award is particularly concerned with the question how regulatory measures aimed at the protection of cultural indigenous sites can be classified from an investor’s perspective, and whether such measures amount to a breach of standards of treatment enshrined in the *North American Free Trade Agreement* (NAFTA).

Glamis Gold, a Canadian mining company, was engaged in gold mining operations from 1988 in southeastern California, in an area of the Californian desert near to Native American lands and areas where the Quechan Indian Nation’s tribe has a special cultural concern.⁸⁶ The mining site was located within the California Desert Conservation Area (CDCA), an area governed by three principles, i.e. *multiple use*, *sustainable yield* and the *maintenance of environmental quality*.⁸⁷ In application of these principles a balance is to be achieved between the competing interests of the investor with “other potential uses for the land and the need to protect federal resources”.⁸⁸ In this context, the CDCA Plan foresees that cultural resources are to “be given the same consideration as other resource values”.⁸⁹ The Tribunal addressed Glamis Gold’s claims for expropriation under Article 1110 NAFTA and fair and equitable treatment (FET) under Article 1105 NAFTA in turn. In the end, it dismissed both claims. In particular, with respect to the FET issue, the Tribunal noted that a change by the government of a decades-old rule grounded on a danger of a “significant, unavoidable adverse impact to cultural resources and Native American sacred sites”⁹⁰ was not contrary to the principle of fair and equitable treatment.

The proceedings were marked by a comparatively strong involvement of the affected community, the Quechan tribe, through the filing of two non-party submissions. In addition, the Quechan tribe was allowed to watch the proceedings from a different location with a separate video feed which was not interrupted when the otherwise restricted discussion on the cultural sites and artefacts was taking place. A strong focus of their submissions focused on the question whether Glamis Gold’s investment and the regulatory measures taken in response by the United States, were consistent with indigenous rights, i.e. “wider public international law”, which they argued was part of the applicable law to be considered by the Tribunal established under the UNCITRAL arbitration rules. At the same time, the award by the NAFTA Tribunal paid surprisingly little attention to the submissions by the Quechan tribe and to the role of indigenous interests in the context of foreign investments proceedings. Not only did it point this out explicitly in the opening passages of the award, but it is also evident in its analysis of the substantive arguments of the parties. Thus, the Tribunal repeatedly emphasized that, in light of the balancing exercise states must conduct when dealing with competing interests, its role was limited to subsidiary determination whether these measures were, e.g., a gross or “manifestly arbitrary” denial of justice. Hence,

⁸³ See <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18498&LangID=E>> (accessed 27 May 2016).

⁸⁴ See n. 82 above.

⁸⁵ *Glamis Gold Ltd. (Claimant) v United States of America (Respondent)*, NAFTA/UNCITRAL Award, 8 June 2009.

⁸⁶ *Ibid.*, para. 10.

⁸⁷ *Ibid.*, para. 46.

⁸⁸ *Ibid.*, para. 48.

⁸⁹ *Ibid.*, para. 50.

⁹⁰ *Ibid.*, paras. 760-761.

even though the award was, in result, favorable to the Quechan tribe's rights, indigenous rights and concerns played little to no role for the Tribunal's decision.

Tsilhqot'in Nation v. British Columbia (Canada)

(by Nicole Schabus⁹⁰ and René Kuppe)

*Tsilhqot'in Nation v. British Columbia*⁹¹ was decided by the Canadian Supreme Court on 26 June 2014. It must be considered as a landmark decision concerning indigenous land and resource rights, within a Common Law legal framework. It is a historic decision in that it resulted in the first affirmation of Aboriginal Title in Canada. The case history goes back to the year 1983, when the Canadian province of British Columbia granted a logging permit in a territory claimed by the indigenous Tsilhqot'in people, living in the Interior of the province of British Columbia. The Tsilhqot'in had resisted the decision of the province through blockades and negotiations, and finally filed an action, seeking a declaration of Aboriginal title based on the constitutional protection for Aboriginal Rights provided under subsection 35 (1) of the Canadian Constitution Act (1982), stating that "(t)he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". Aboriginal title is a doctrine developed in Common Law countries by jurisprudence, stating that indigenous tenure by Aboriginal Peoples has persisted the assumption of sovereignty by the British colonial empire, which in itself is a problematic concept. In Canada, one of the sources of Aboriginal title is exclusive occupation at the time of assertion of sovereignty, which for British Columbia has been set for 1846 with the Oregon Boundary Treaty. The Canadian Supreme Court set out the following principles for the proof of Aboriginal title in *Delgamuukw v. British Columbia*: "(i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive".⁹²

The full application of the test was to be determined in the Tsilhqot'in case whose claim referred to an area in the core of Tsilhqot'in territory of approximately 4,300 square kilometers. British Columbia Supreme Court trial judge Justice Vickers accepted a territorial concept of Aboriginal Title, but he rejected the arguments by the province of British Columbia and the federal government urging a site specific approach, where only specific intensively used sites such as villages could be subject to Aboriginal Title, as a "postage stamp approach" that was inconsistent with Canadian constitutional law and for that matter international law. Yet that was the very approach that the British Columbia Court of Appeal adopted relying on the rejected "cultural security approach", suggesting that indigenous peoples could maintain their culture solely through recognition of Aboriginal use rights, such as hunting and fishing, throughout the territory, while declarations of title would be limited to small site specific areas such as villages, preferably fenced areas and extensively and proactively used areas, such as "salt licks and buffalo jumps". This approach was unanimously and soundly rejected by the Supreme Court of Canada, which stated that "[t]here is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title [...]"⁹³ The Supreme Court hence reverted to a territorial concept of Aboriginal Title, arguably going beyond its own previous decisions on that regard. It issued a declaration of Aboriginal Title to a contiguous area of about 1,750 square kilometers that the Tsilhqot'in had historically used and occupied. Aboriginal Rights to hunt, fish and trap had already been accepted in a legally binding manner, for the entire claim area, by courts. The legally binding declaration of Title is actually contained in a map prepared by the trial judge together with a cartographer, using elevations on the plateau, rivers including the spawning grounds for the Chilko salmon run, and other natural features to demarcate the area.

The importance of the Supreme Court of Canada issuing the first declaration of Aboriginal Title in Canadian history cannot be overstated. In previous cases, such as *Delgamuukw*, while upholding the concept of Aboriginal Title, no legal remedy had been granted and the case was sent back to trial. While the Supreme Court in its decision does not explicitly refer to international law, a number of the indigenous interveners made reference to international legal standards, such as the right to self-determination and other specific indigenous peoples' rights. They also included references to Canada's policy of not recognizing indigenous land rights being criticized by international human rights bodies, including by the Inter-American Commission on Human Rights, that Canada lacked effective national remedies in regard to the recognition of indigenous land rights, both in the courts and negotiations, in regard to the Hul'qumi'num Nation,⁹⁴ who also intervened in this case before the Supreme Court of Canada. Together, indigenous peoples made it clear that, if they

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⁹¹ 2014 SCC 44.

⁹² [1997] 153 D.L.R. (4th), para. 143.

⁹³ See *Tsilhqot'in Nation v. British Columbia*, n. 91 above, para. 42.

⁹⁴ See Inter-American Commission on Human Rights, Report No. 105/09, Petition 529-07, Admissibility, 30 October 2009, available at <<http://www.cidh.oas.org/annualrep/2009eng/Canada592.07eng.htm>> (accessed 12 June 2016), paras. 31-43.

were to be once again denied a remedy, they would take the case before international bodies and this clearly weighed heavily on the Supreme Court of Canada issuing a declaration of title.

The judgment in point also has important implications for a correct understanding of the definition of indigenous rights over land. It strengthens the view that the geographical extent of indigenous land rights must be defined according to traditional patterns of land and resource use, and must not limit indigenous land rights to areas under intense occupation. This should be an important understanding of the land rights articles included in the UNDRIP, Article 26(2) of which states that “[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired”. The Tsilhqot’in decision is an important step to show that “traditional occupation or use” should not be defined by a reference to a western understanding of intense land use, but recognize and protect indigenous patterns of stewardship over and use of lands.

The Onondaga Nation and The Haudenosaunee against The United States

(by Joseph J. Heath, Esq., Onondaga Nation General Counsel)

This case study concerns the Onondaga Nation’s Land Rights Action, which was summarily dismissed in the federal courts of the United States and the actual, practical problems which the Nation has experienced in gaining any true justice for loss of human rights. The Onondaga Nation is a sovereign Indigenous nation whose original homelands are situated in what is now central New York State, in the United States. The Nation seeks redress for the violation of the human rights of the Onondaga people to their lands, to equal treatment, and to judicial protection. The Nation and its people have a unique spiritual, cultural and historic relationship with the land, which is embodied in the Gayanashagowa, the Great Law of Peace.

The Haudenosaunee Six Nations, including the Onondaga Nation, entered into three treaties with the United States: the 1784 Treaty of Ft. Stanwix, the 1789 Treaty of Ft. Harmer and the 1794 Treaty of Canandaigua. In these treaties, the United States affirmed the sovereignty of the Nation, promised to protect Nation lands, and guaranteed the Nation the “free use and enjoyment” of its territory. Between 1788 and 1822, the State of New York took approximately 2.5 million acres of Onondaga Nation land in violation of federal law and treaties and in violation of the Nation’s own law. Today, despite these treaty and statutory guarantees, the Onondaga Nation is in possession of only a small fraction of its legally-protected, original territory. The land currently acknowledged as Onondaga territory under federal law comprises approximately 6,900 acres. The courts of the United States have failed to provide any remedy for this loss of land. The Nation asserted its case at three levels of the federal judicial system: U.S. District Court, the Court of Appeals and the U.S. Supreme Court. The Nation was denied relief at each stage. The federal courts uniformly ruled that they are powerless to provide any remedy. As a result, the loss of Nation lands at the hands of New York State cannot be redressed in the U.S. judicial system. On 29 March 2005, about three weeks after the filing of the Nation’s Complaint, the United States Supreme Court ruled, in *City of Sherrill vs. Oneida Indian Nation*,⁹⁵ that the doctrines of “laches, impossibility and acquiescence” precluded the Oneida Nation from asserting immunity from real property taxes on treaty protected, reservation land that had been taken by the State of New York in 1795 but subsequently purchased by the Oneidas in the 1990s. Oral argument on the Defendants’ Motion to Dismiss was heard by U.S. District Court Judge Kahn, in Albany, New York, on 11 October 2007. Decision was reserved at that time. On 5 August 2010, the Second Circuit Court of Appeals dismissed another Indian land claim based on violations of the Trade and Intercourse Act.⁹⁶ On 22 September 2010, Judge Kahn issued a Memorandum Decision and Order that granted the Defendants’ motions to dismiss and ordered the dismissal of the Nation’s Complaint in its entirety, thereby foreclosing the possibility of any judicial relief for New York State’s violations of the treaties and federal law. Oral argument was held before a three-judge panel of the court in New York City on 12 October 2012. One week later, on 19 October 2012, the Court of Appeals issued a two page Summary Order and Judgment affirming the District Court’s dismissal of the Nation’s complaint.⁹⁷ In 2013, the Nation’s Land Rights Action was summarily dismissed by the federal courts of the United States. Subsequently, on 15 April 2014, the Nation filed a Petition against the United States before the Inter-American Commission on Human Rights.⁹⁸

The loss of control over and access to their traditional hunting, gathering and fishing areas at the hands of the State of New York has deprived the Onondaga people of food and other materials essential to their health and welfare. As a result, the loss of their lands has significantly degraded the health of the Onondaga people; and the loss of their lands has been profoundly disruptive to the Nation’s citizens and their health. The loss of Onondaga original territory has also weakened

⁹⁵ 544 U.S. 197 (2005).

⁹⁶ *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010).

⁹⁷ *Onondaga Nation v. State of New York*, Summary Order, October 19, 2012 (2d Cir.).

⁹⁸ See <<http://www.onondagation.org/news/2014/the-onondaga-nation-files-petition-against-united-states-with-inter-american-commission-on-human-rights-41514/>> (accessed 27 May 2016).

and in some cases severed the Nation's cultural and spiritual ties to Onondaga sacred sites, such as Onondaga Lake, the glacial, kettle lakes in the region of Tully, New York and many others.

The United States domestic legal system's denial of a remedy for breach of the Nation's land rights and treaties is a violation of the Nation's fundamental human rights protected by the American Declaration on the Rights and Duties of Man, the UNDRIP and other rules of customary international and treaty law. In addition, the illegal dispossession of the Nation's lands was in clear violation of the above mentioned bilateral treaties between the United States and the Haudenosaunee Six Nations, the United States Constitution and federal laws of the United States. There is no international forum that has the jurisdiction to enforce any human rights decision against the United States. Additionally, the Inter-American Commission on Human Rights is so severely underfunded and understaffed that cases take far too long for any adjudication or decision. Once a decision is eventually released by the Commission, the United States can simply ignore it, as it has done in other cases won by Indigenous nations. So, the practical result is that no relief is available for the violation of human rights of Indigenous nations by the United States.

The Onondaga Nation recommends that the United States government recognizes the Nation's land rights and fully comply with relevant international legal standards (especially the UNDRIP), removes the doctrine of discovery from its legal jurisprudence, reaches an agreement with the Nation, through discussion with the Nation's leaders and the Nation's chosen representative, on mechanisms by which the United States can fulfill its treaty obligations to the Nation and remedy the violations of the Nation's rights. To the latter end, the government should establish an independent commission to study the violation of treaties between the United States and Indian nations and the subsequent disruption of Indigenous cultures, economies and governments by the United States, as well as adopt any legislative, administrative or other mechanisms to ensure the protection of the Nation's rights.

Fate Control and Human Rights: Local Governance in America's Arctic

(by Mara Kimmel)

This case study focuses on land ownership and, more importantly, governance rights of Alaska Native peoples. The extent of sovereign rights to self-government is the result of federal and Alaskan state legislation and the decisions of the court systems, and it is continually evolving. While the Alaska Constitution's text endorses local governance,⁹⁹ its practices do not. Alaska's policies of local self-government stand in stark contrast to the lack of authority given to tribal governments. While the urban system of governance is relatively simple, the corresponding rural system is very complex. This "complex non-system" of governance in the rural areas of Alaska creates tremendous obstacles for tribal governments when measured against similarly situated local governments in urban Alaska. The impacts of this disparity are magnified by the unwillingness of the State of Alaska to work with tribal governments. On multiple occasions, for example, the State has litigated against Alaska Native tribes to prevent their exercise of certain aspects of local self-government.¹⁰⁰ The legislation that aimed to settle aboriginal land claims by Alaska Natives – *Alaska Native Claims Settlement Act* of 1971 (ANCSA) – was rooted in promoting economic opportunities for Alaska Natives and created for profit regional and village corporations to effectuate that goal. One outcome of this land claims settlement, however, was to sever tribal jurisdiction over traditional lands, leading to a situation where they do cannot govern their own territory. The legal solution in ANCSA and other Alaska specific laws and regulations prevents tribal governments from exercising the same sovereign rights over their territory as other indigenous communities, and is thus distinctly different from the self-governance rights other indigenous tribes enjoy in the rest of the United States. To remedy this gap in self-governance, Alaska Natives are attempting to reassert their territorial governance rights via litigation and innovative co-management initiatives. The success of these outcomes has yet to be realized, and depends in large part on the application of legal principles of internal self-governance powers inherent to all indigenous peoples to Alaska Natives.

Two approaches to remedying the loss of governance are advanced: expanding "Indian Country" to support territoriality, and amending federal law to provide for co-management of federal resources by tribes. With respect to the first approach, in May of 2014 the Department of Interior issued a draft regulation allowing Alaskan lands to be returned to trust status, recasting them as "Indian country" capable of supporting tribal governance.¹⁰¹ As for the second approach, it would consist in amending the *Alaska National Interest Lands Conservation Act* (ANILCA), through the *Alaska Native*

⁹⁹ See Article X, § 1: "The purpose of this article is to provide for maximum local self-government [...]"

¹⁰⁰ See, e.g., *Simmonds v. Parks*, 329 P.3d 995 (Alaska 2014) (holding that tribal sovereignty extended to member children, against state objections in the trial court); *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998) (holding that ANCSA extinguished Indian country); *John v. Baker*, 982 P.2d 738 (Alaska 1999) (holding that tribal court and state court exercised concurrent jurisdiction over child custody disputes between tribal members). See also *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), when the U.S. Supreme Court held that lands conveyed under ANCSA are outside the definition of "Indian Country" and cannot be the basis for sustaining territorial sovereignty.

¹⁰¹ See News Release, "United States Department of the Interior, Secretary Jewell Issues Secretarial Order Affirming American Indian Trust Responsibilities", 20 August 2014, available at <<http://www.bia.gov/cs/groups/public/documents/text/idc1-027607.pdf>> (accessed 27 May 2016).

Subsistence Co-Management Demonstration Act of 2014 bill.¹⁰² This bill proposes a new co-management structure for the Ahtna region in Interior Alaska. It would amend ANILCA to provide for co-management on traditional lands within this specific region, integrating tribal governance and doing away with the dual system of management currently in place. To a notable extent, however, successful application of self-governance relies on the willingness of the U.S. and Alaska governments to cooperate and acknowledge those rights. In particular, State support should be accorded to rural governments, including tribal governments, to the same degree as in urban communities. Such support would enhance the capacity of tribal governments to adopt policies that promote human development and fate control.

ASIA

From Declaration to Implementation: The experience of the Subanon in the Philippines with the Operationalization of the U.N. Declaration on the Rights of Indigenous Peoples

(by Cathal M. Doyle)

In 1997 the Philippines Congress passed the *Indigenous Peoples Rights Act* (IPRA).¹⁰³ This landmark law was heavily inspired by the then draft UNDRIP, effectively incorporating the Declaration's key provisions regarding the recognition of indigenous peoples' territorial, cultural and self-determination rights into the national legislative framework. Among other things, the IPRA affirms the right of indigenous peoples "to use their own commonly accepted justice systems, conflict resolution institutions, peace building processes or mechanisms and other customary laws and practices within their respective communities and as may be compatible with the national legal system and with internationally recognized human rights".¹⁰⁴ The IPRA also established a National Commission on Indigenous Peoples (NCIP), responsible for the "formulation and implementation of policies, plans and programs to recognize, protect and promote the rights and well-being of [indigenous peoples with due regard to their beliefs, customs, traditions and institutions] and the recognition of their ancestral domains as well as the rights thereto".¹⁰⁵ The Act affirms that customary law has primacy within ancestral domains in the context of dispute resolution, with the NCIP serving as an appeal mechanism. This requirement is consistent with the UNDRIP's recognition of indigenous peoples' rights to self-determination and autonomy, to maintain and strengthen their political, legal, economic, social and cultural institutions and to promote, develop and maintain their own juridical systems or customs.¹⁰⁶

Also in 1997, the CERD Committee issued its General Recommendation No. XXIII on Indigenous Peoples¹⁰⁷ – a document which served to strengthen indigenous peoples' position in negotiations with States on the UNDRIP and would become a key touchstone for State recognition of indigenous peoples' rights. In 1997, the government of the Philippines also submitted a State party report to the CERD Committee, which was to be its last for over twelve years, prompting the Committee to commend its effort in drafting the IPRA, but also to express its concerns in relation to the negative impacts development projects were having on the country's indigenous peoples.¹⁰⁸

1997 was also the year that the Subanon community located at the foot of Mt Canatuan, on the Zamboanga Peninsula of Mindanao, obtained its Certification of Ancestral Domain Claim (CADC) from the Philippines' Department of the Environment and Natural Resources (DENR), and commenced its engagement with the new procedures for strengthened rights recognition under the UNDRIP-inspired IPRA. This convergence of events offered the promise of a future based on respect for their inherent rights in favour of the Philippines' indigenous peoples, such as the Subanon of Mt Canatuan. At that time the Subanon were involved in a struggle to protect their territories from the encroachment of a junior Canadian mining company, TVI Resources Development Philippines, Inc. (TVIRD). Of particular concern to the Subanon was the company's intent to develop an open pit gold mine thereby, destroying the peak of their sacred mountain, Mt Canatuan. From 2004 on-wards the Subanon adopted an alternative strategy based on two mutually reinforcing rights assertion approaches. The first approach was to invoke their own customary legal system. This resulted in the issuance of two rulings, one against the State in 2004 and the other against the company in 2007, for violations of Subanon customary law. The second approach adopted by the Subanon was to focus on international fora in which to seek remedies for their grievances. In particular, they turned to the CERD Committee for assistance in 2007. This opened a long dialogue between the CERD Committee, the government and the community, as a result of which the Committee requested several times that the Government provide it with information in relation to steps taken to implement its recommendations. On the one hand, the CERD Committee recognized that positive developments had occurred; in particular, the Committee

¹⁰² See <<http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=371688>> (accessed 27 May 2016).

¹⁰³ Available at <<http://www.gov.ph/1997/10/29/republic-act-no-8371/>> (accessed 27 May 2016).

¹⁰⁴ Ibid., Chapter IV, Section 15.

¹⁰⁵ Ibid., Chapter VII, Sections 38 and 39.

¹⁰⁶ UNDRIP Articles 5 and 34.

¹⁰⁷ See n. 27 above. For an assessment of the background to CERD Committee's drafting of General Recommendation XXIII see C. Doyle C., *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent*, London, 2015, pp. 166-7.

¹⁰⁸ CERD Committee Concluding Observations, Philippines, U.N. Doc. CERD/C/304/Add.34 of 15 October 1997, paras. 9 and 17.

welcomed “the recognition and the protection by the State party of traditional indigenous justice and conflict resolutions mechanisms” and its “statements that it wishes to respect the customary practices [...] of the Subanon people”,¹⁰⁹ also placing considerable emphasis on the role of Subanon customary law in free, prior and informed consent processes and in relation to ensuring culturally appropriate reparations. On the other hand, however, as of September 2015 the government has not yet responded to CERD Committee’s request for updated information or taken the necessary measures to implement its recommendations in relation to reparations due to the Subanon.

This reality reveals that, to a notable extent, the post-IPRA relationship between indigenous peoples, the Philippine State and mining companies seeking to operate there continues to be dominated by power rather than by law. The failure to implement the law in accordance with its spirit and intent is simply a reflection of the extent of the power imbalances in governance structures at local, national, regional and international levels, all of which act in favour of mining companies to the detriment of indigenous peoples’ enjoyment of their rights. This reflects a general situation in the context of which the rights of Philippine indigenous peoples are recognized under the law but not yet fully realized in practice.

AFRICA

Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v. Kenya

(by *Ebun Abolarin*, with the contribution of *Alexandra Tomaselli*)

The ownership claim of the Endorois to their ancestral lands in the Lake Bogoria area is well known to the neighbouring tribes because the sites were used seasonally for cultural festivities that involves all Endorois from the whole region. Though Kenya has no domestic law or instrument with express mention of the rights of indigenous peoples, the land had been enjoyed without any disturbance for centuries, even under the British colonial administration. However, the ownership and habitation of that territory provided a close link with the land, in which the Endorois practised a sustainable way of life until dispossession through the creation of the Lake Hannington Game Reserve in 1973, and a subsequent re-gazetting of the Lake Bogoria Game Reserve in 1978 by the Government of Kenya. The Endorois were promised compensation of fertile land for 400 families after the creation of the game reserve, and each of the 400 families was to be paid 3,150 Kenyan Shillings as for relocation. However, only 170 families received some money, in 1986. The community claimed justice before Kenyan domestic courts, but it was denied. Therefore, their case was brought before the African Commission on Human and Peoples’ Rights. The Commission rendered its decision on 25 November 2009,¹¹⁰ recognizing the intrinsic guiding value of the UNDRIP’s standards and finding that Kenya violated Articles 1 (obligation to respect rights), 8 (freedom of conscience and religion), 14 (right to property), 17 (right to take part in cultural life and to promotion and protection of morals and traditional values), 21 (peoples’ rights to freely dispose of their wealth and natural resources) and 22 (peoples’ right to their economic, social and cultural development) of the 1981 *African Charter on Human and Peoples’ Rights*.¹¹¹ Therefore, the Commission recommended the government of Kenya to: recognise rights of ownership to the Endorois and return their ancestral land to the community; ensure unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle to the Endorois community; pay adequate compensation to the community for all the loss suffered; pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the reserve; grant registration to the Endorois Welfare Committee; engage in dialogue with the community for the effective implementation of these recommendations; report on the implementation of these recommendations within three months from the date of notification.

In order to persuade Kenya to implement its recommendation, in 2013 the Commission adopted a resolution calling on the Republic of Kenya to implement the Endorois decision,¹¹² urging the government to comply with its obligations under the African Charter, including giving effect to the rights and freedoms guaranteed therein, as well as to inform the Commission of the measures proposed to implement the Endorois decision, and more particularly, the concrete steps taken to engage all the players and stakeholders, including the victims, with a view to giving full effect to the decision. The government of Kenya has so far failed to honour its obligations arising from the Commission’s communication, but, in its Combined Periodic Report (CPR) of 2014¹¹³ addressed most of the issues enumerated as violations against the Endorois Community under its 2010 Constitution. In the CPR, Kenya claimed that, in the last few years, it had “made

¹⁰⁹ See Concluding Observations, Philippines, U.N. Doc. CERD/C/PHL/CO/20 of 23 September 2009, paras. 7 and 25.

¹¹⁰ See Communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, n. 20 above.

¹¹¹ Available at <http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf> (accessed 27 May 2016).

¹¹² Resolution 257 of the African Commission on Human and Peoples’ Rights, meeting at its 54th Ordinary Session, held in Banjul, The Gambia from 22 October to 5 November 2013, available at <<http://www.achpr.org/sessions/54th/resolutions/257/>> (accessed 27 May 2016).

¹¹³ CPR – Republic of Kenya, Combined 8th-11th Periodic Report on the African Charter on Human and Peoples’ Rights, November 2014, available at <http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya_state_report_eng.pdf> (accessed 27 May 2016).

remarkable progress in safeguarding the rights, freedoms and duties of its people [including indigenous peoples and socially disadvantaged persons] as enshrined in the Charter”,¹¹⁴ as well as that all the rights assumed as violated by the Commission in its recommendation are guaranteed and protected by its 2010 Constitution, hence they may be fully enjoyed by the Endorois who are nomadic pastoralist within their traditional lands. With respect in particular to the right to property, Kenya emphasized that Article 40 of the Constitution allows every person the right to acquire and own property, and that compensation is due to persons for land compulsorily acquired by the government; compulsory acquisition has to be only for public use and the Government has to pay promptly and in full.¹¹⁵ Despite the statements included in the CPR, and the effort of the Government of Kenya in late 2014 to set up a task force dedicated to the implementation of this ruling,¹¹⁶ so far Kenya has failed to implement the *Endorois* decision as recommended by the African Commission.

AFTRADEMOP and Global Welfare Association (on behalf of the Moko-oh Indigenous Peoples of Cameroon) v. Cameroon

(by *Ebun Abolarin*)

The Association for the Reconstruction and Development of the Moko-oh Peoples of Cameroon (AFTRADEMOP) – an agro-pastoral (minority) people of Upper Moghamo, a clan in Batibo Sub-division of the North-west of Cameroon – and Global Welfare Association on behalf of the Moko-oh indigenous peoples of Cameroon filed a complaint to the African Commission on Human and Peoples’ Rights on 9 February 2007.¹¹⁷ Though the Complaint is against the State of Cameroon, the oppression and domination was perpetrated by the Bali-Nyonga, a migrant tribe from Chamba in the North of Cameroon. The Moko-oh alleged that the domination, enslavement and oppression began during the colonial era with the German and British administration, which was compounded by series of raids in 1914, at the beginning of the 1st World War. At that period, the land of the Moko-oh was invaded by the Bali-Nyonga, a local tribe, who chased them out of their land to different parts of the country, while their oil and wine palm plantation were demolished. But in 1928 a delimitation of the boundary between the Bali-Nyonga and the Moko-oh was carried out by the District Officer of the Bamenda Division, which was further inspected and confirmed by the Provincial Resident of the Cameroon Province in Buea in 1929. But the outright objection of the Bali-Nyonga to this officially set boundary prevented the Moko-ohs from returning to their village. This refusal of the Bali-Nyonga to accept the 1928 boundary adjustment led to incessant persecution of the Moko-oh in order to drive them perpetually out of their ancestral land. Thus, the agitation of the Moko-oh to regain their land through all available constituted institutions in Cameroon began. The Complainant’s petitions before administrative authorities, seeking redress to repossession its land, was without success, and all Moko-oh community’s efforts to regain their land and property have been frustrated by the Cameroonian authorities. The violations alleged by AFTRADEMOP in its complaint concern Articles 3 (equality of all individuals before the law), 4 (right to life and integrity of the person), 5 (right to respect of human dignity), 10 (right to free association), 11 (right to free assembly), 12 (right to freedom of movement and residence), 14, 19 (right to equality of all peoples), 20 (peoples’ right to existence and freedom), 21, and 24 (peoples’ right to a general satisfactory environment favourable to their development) of the African Charter. The ultimate purpose of the complaint is to persuade Cameroon to return the Moko-oh their traditional territories on the basis of the established pre-independence boundary delimitation of 1928 and recognize them under domestic law, to rehabilitate the Moko-oh villages and allow the resettlement of the community there, as well as to protect the Moko-oh from further discrimination and oppression.

San and Bakgalagadi peoples’ land rights and the case of the Central Kalahari Game Reserve in Botswana

(by *Maria Sapignoli*[®], with the contribution of *Robert K. Hitchcock*[®], *René Kuppe* and *Alexandra Tomaselli*)

This case study concerns the eviction of San and Bakgalagadi people, who sued the Government of Botswana and won two cases before domestic Courts in 2006 and 2011. The Central Kalahari Game Reserve in Botswana was established in 1961 to protect the wildlife resources and to guarantee the hunter-gatherer San people access to land, and, thus, their means of livelihood. Over time, the lifestyle of the San people and other residents of the Game Reserve changed. In 1986, the Government decided to relocate all people residing within the Reserve to outside settlements on the grounds that the communities’ lifestyles were considered to be no longer consistent with the objectives of the Reserve, as they were allegedly depleting the wildlife and natural resources of the Reserve. The first set of removals took place in 1997. In 2002, the Government ceased provision of basic and essential services to the inhabitants who remained in the Game Reserve,

¹¹⁴ Ibid., para. 1.

¹¹⁵ Ibid., para. 100.

¹¹⁶ Minority Rights Group International (MRG), “Kenyan Task Force formed to implement the 2010 Endorois ruling”, 29 September 2014, available at <<http://minorityrights.org/2014/09/29/kenyan-task-force-formed-to-implement-the-2010-endorois-ruling/>> (accessed 27 May 2016).

¹¹⁷ Communication 336/2007 – *AFTRADEMOP and Global Welfare Association (on behalf of the Moko-oh Indigenous Peoples of Cameroon) v. Cameroon*, available at <http://www.achpr.org/files/sessions/13th-ecocommunications/336.07/achpreos13_336_07_eng.pdf> (accessed 27 May 2016).

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and removed the pipe and capped the borehole that brought water to inhabitants of the Reserve. Hence, 239 San and Bakgalagadi individuals, who had lived in the Reserve, lodged an urgent application with the High Court of Botswana, seeking an order declaring the termination of basic and essential services by the Government unlawful and unconstitutional, and declaring the Government's obligation to restore these services and their access to the lands and resources within the Reserve. In December 2006, the High Court of Botswana, in the case of *Roy Sesana v. the Attorney General*, held that the "[a]pplicants were deprived of [possession of the land, which they lawfully occupied] by the Government forcibly or wrongly and without their consent",¹¹⁸ and that the applicants have the constitutional and legal rights to hunt in the Reserve. Following the High Court's decision, the government allowed to return to the Reserve only the applicants to the Court case. In addition, the government stated that it is not obligated to provide access to water in the Reserve and that it will not permit the inhabitants to gain access to water through the use of the Mothomelo borehole. Later, on 27 January 2011, the San people won an appeal against the Government in the Botswana Court of Appeal.¹¹⁹ The Appeal Judges quashed the previous ruling of Justice Walia that denied people access to water on their ancestral land and referred to Kalahari people's plight as "a harrowing story of human suffering and despair caused by a shortage of water in the harsh climatic conditions of the Kalahari Desert".¹²⁰ Furthermore, the Government was ordered to pay the costs of the San people's appeal.

The two decisions just described certainly represent positive developments in terms of compliance with the standards set by the UNDRIP. So far, however, the judgements have not been implemented by the government of Botswana. In February 2015 Roy Sesana, first applicant in the 2006 case, met with President Khama. At the end of this meeting the President decided to direct several ministers to go to the central Kalahari and discuss the issues that people in the Central Kalahari Game Reserve were concerned about. Following the visit, the ministers made several promises concerning initiatives aimed at facilitating life in the Reserve (including the commitments of providing a mobile health clinic for the settlements in the reserve, of transporting children living in the Reserve back and forth to school, or to provide pensions to the elderly people qualified to receive them), but, as of March 2016, none of these promises have been acted upon. As a consequence, it cannot be said that at the moment of this writing the applicants have been completely satisfied by the outcome of the two cases, since they still lack hunting rights, access to water in some communities, and the ability to move in and out of the reserve freely and to stay there as long as they wish.

Realizing Land Rights of the Nuba People in Sudan

(by Jernej Letnar Čerňič)

This case study studies deals with land rights of the Nuba people, which are an indigenous ethnic group living in the area of the Nuba mountains in Southern Kordofan in Sudan. They include a variety of tribes in the Nuba mountains. The land is central to the Nuba peoples' cultural existence, language, customs, identity, and socio-economic survival, and is critical to the community's survival. Customary laws have traditionally regulated land tenure in the Nuba mountains. However, the Sudanese land tenure system has undermined the ancestral land rights of the Nuba people.¹²¹ In particular, the government has seriously disregarded the Nuba peoples' ancestral lands and their individual and collective human rights. The Nuba peoples have been pushed "systematically to the margin of their customarily owned land".¹²² Most recently, *The New York Times* reported, on 3 July 2011, that the Sudanese army has "been relentlessly pounding the Nuba Mountains from Russian-made Antonov bombers for weeks [...] Hundreds of civilians have been killed, including many children. Bombs have been dropped on huts, on farmers in the field, on girls fetching water together, slicing them in half with buckets in their hands".¹²³ So far, no case or claim has been brought to enforce Nuba's land rights or their human rights generally speaking, and their current situation constitutes an evident violation of Sudan's international obligations towards indigenous peoples. Therefore, the government of Sudan should be urged to strengthen its national judicial system, as well as to ratify the relevant international treaties – including the 1966 *Optional Protocol to the ICCPR*¹²⁴ – so as to ensure access to justice in favour of the Nuba for the violations of their land rights and other human rights of which they are victim.

OCEANIA

Te Urewera: Return and Co-Management of Traditional Lands of the Tuhoe People, Aotearoa New Zealand

¹¹⁸ Roy Sesana et Al. v. the Attorney General, 2006 African Human Rights Law Reports 183, para. 55(4).

¹¹⁹ *Matsipane Mosetlhanyene and Gakenyatsiwe Matsipane v. the Attorney General*, 27 January 2011, available at <www.esr-net.org/sites/default/files/bushmen-water-appeal-judgement-jan-2011.pdf> (accessed 27 May 2016).

¹²⁰ *Ibid.*, para. 4.

¹²¹ See G.K. Komey, "The Denied Land Rights of the Indigenous Peoples and Their Endangered Livelihood and Survival: The Case of the Nuba of the Sudan", 31 *Ethnic & Racial Studies*, 2008, 991, pp. 992 and 996.

¹²² *Ibid.*, p. 1007.

¹²³ See J. Gettleman, "Sudanese Struggle to Survive Endless Bombings Aimed to Quell Rebels", *New York Times*, 3 July 2011, available at <<http://www.nytimes.com/2011/07/04/world/africa/04sudan.html?ref=sudan>> (accessed 30 May 2016).

¹²⁴ 999 UNTS 171.

(by Catherine J. Iorns Magallanes)*****

Te Urewera National Park was a large park created from ancestral lands of the indigenous Tuhoe people. As part of the New Zealand attempt to provide redress and reparations for historic grievances including such land takings, agreement was recently reached whereby the New Zealand government passed legislation removing the national park status, creating a separate legal personality which holds title to its own lands, and enabling Tuhoe to co-manage the new entity, Te Urewera. The Tuhoe people argue that it is only through the exercise of their traditional relationship with the land and its natural environment that they would be able to exercise their spiritual authority through guardianship. The Crown was unable to agree to transferring ownership of a national park to a Maori tribe, but instead offered Tuhoe the solution of legal personality for the park, whereby no one owned the park but it owned itself. It would remain protected, with public use, akin to a national park, but it would maintain its own separate identity and be governed very differently, with significant Tuhoe input and in a way which better respects Tuhoe cosmology and relationship with the lands. This agreement was finalised in March 2013 and legislation to implement it passed in July 2014.¹²⁵ The purpose of the Act reflects various aspects, particularly “to establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance, and in particular to — (a) strengthen and maintain the connection between Tuhoe and Te Urewera; and (b) preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage; and (c) provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all”.¹²⁶ As for the principles governing the implementation of the Act, they focus primarily on different aspects of environmental protection, but are also protective of indigenous relationships with the park, and of public access for the benefit of all New Zealanders.¹²⁷

EUROPE

The Rönnbäcken Case

(by Maja K. Eriksson)

The Rönnbäcken case deals with a concession which has been granted to an international corporation (Nickel Mountain AB) to establish three open pit mines (K No. 1-3) to be used for about 27 years within a traditional reindeer herding territory, without asking for and receiving the consent of the Sámi village Vapsten. The members of Vapsten have officially declared that they have no intention whatsoever to offer their consent to the mining project and to the corporation to entry on the territory in question. The refusal to give their consent should have some implications, e.g. that the activities should be discontinued, but the Swedish laws and the ways that authorities interpret them have not granted any protection to the Sámi in the area. Sámi did complain on the basis of the mining code but the government rejected their claim. For this reason, the Sámi made an application comprising an urgent request for interim measures, which is a tool for preventing human rights violations and irreparable damage, to the CERD Committee in September 2013. The claim was presented by the Sámi Council together with a Sámi community (Vapstens sameby). It was based on the assumption of the Vapsten’s members (16 persons) that the decision to grant permission for the mine constitutes a violation of the right to property in conjunction with an arguable claim of discrimination, and a violation of the right to effective remedy, in combination with the right to equal treatment before tribunals, in breach of, respectively, Articles 5(d)(v), 6 and 5(a) of the Convention on the Elimination of All Forms of Racial Discrimination. At the time of writing, the communication is still pending.

It is to be noted that in Sweden, a dualist country, courts are not used to apply any other international human rights instrument than the 1950 *European Convention on Human Rights*,¹²⁸ which is directly applicable law. Unfortunately, so far the European Court of Human Rights has not shown particular sensibility (contrary to other human rights bodies, e.g. the IACtHR) as regards the application of general human rights provisions to indigenous peoples. This explains why there is a clear discrepancy between what international law requires in terms of indigenous peoples and how domestic law has been interpreted and applied in Sweden. Also, domestic law presently in force in Sweden is not supportive of Sámi land rights, and may therefore have severe and adverse impact on reindeer herding. Yet, there are positive recent signs within the Swedish legal court system paying more attention to international law standards related to indigenous peoples.

Case Study of Norway: How Norway’s International Law Obligations vis-à-vis the Sámi Indigenous Peoples’ Land Rights have been Implemented in Practice

(by Øyvind Ravna and Timo Koivurova)

***** This text is an extract from Catherine J. Iorns Magallanes, “Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment”, 21 *Widener Law Review* 2, 2015, pp.273-327.

¹²⁵ See *Te Urewera Act 2014*, available at <<http://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html#DLM6183609>> (accessed 27 May 2016).

¹²⁶ *Ibid.*, Part 1, Subpart 1, Section 4, “Purpose of this Act”.

¹²⁷ *Ibid.*, Part 1, Subpart 1, Section 5, “Principles for Implementing this Act”.

¹²⁸ *CETS* No. 005.

This case study concentrates on how land rights of Sámi indigenous people in Norway have been identified and given legal recognition, in particular in the northernmost Finnmark County. Norway was the first country in the world to ratify ILO Convention 169, in 1990,¹²⁹ as, and, as required by the Convention, in 2005 enacted the *Finnmark Act*¹³⁰ to, *inter alia*, identify and recognize, through specific procedures, indigenous specific Sámi land and water rights within that county. The fact that Norway has ratified and implemented ILO Convention 169 in its domestic law is notable also for the reason that the other countries where Sámi also live (Finland, Sweden or Russia) have not ratified the Convention nor have they tried to establish any procedures to investigate and recognize Sámi land and water rights.

The *Finnmark Act* incorporates ILO Convention 169, which in Article 8(1) establishes that, “in applying national laws and regulations to the peoples concerned, due regard is to be given to their customs or customary laws”. To this purpose, the Act is grounded on the assumption that, when establishing special procedures for clarifying land ownership by the Sámi, their customs and legal opinions should be taken into account, basing on applicable national law. With a view of implementing ILO Convention 169 (particularly Articles 14 and 15, on land rights), Norway has transferred the ownership of 95% of the lands and waters of Finnmark county to its residents; they are administered by the so called Finnmark Estate, consisting of 3 members appointed by the Sámi Parliament and 3 by the Finnmark County Council. The main procedural tool established by the *Finnmark Act* is a commission (the Finnmark Commission) mandated to investigate and adjudicate Sámi land and water rights in Finnmark. In addition, a special tribunal (The Uncultivated Land Tribunal of Finnmark) has the task to settle disputes concerning such rights arising from the investigation of the Commission. These procedures, however, are not reserved to the Sámi, but are open to all Finnmark County residents, circumstance which is being criticized.

In principle, Norway has created a legislative framework (although only for Finnmark) which should be able to process claims of immemorial ownership and use rights of indigenous Sámi. Unfortunately this is not the case. In fact, in the five cases where the Finnmark Commission has so far provided a report, it has not taken appropriately into account Sámi customary law, or oral evidence, and has mostly proceeded from the basis that Norway has by now established legal ownership to these lands. Only in one case, in the small abandoned coastal Sámi village of Gulgofjord, the Commission has found that local people have acquired ownership to an outlying area of 30 square kilometers. However, the case was not of any practical significance, since the Commission concluded that the owners (mostly successors of coastal Sámi living there up to 1970) would need to move back to such abandoned village, a roadless village by the ocean, to acquire the title. In the four other investigation fields, the Commission has not followed what the legislature stipulated in the Finnmark Act, namely, the importance of Sámi use of lands or Sámi customary law. Instead, it has found that governmental activities, rather than the local, informal management of natural resources, are of law-making significance. As a consequence, Norway has received rather harsh criticism from the CERD Committee, which has noted, among other things, that “there remain significant gaps in translating the legal recognition into practice, thus resulting in reality in limited recognition and protection of rights over their lands”.¹³¹

The behaviour of the government of Norway is also in contravention of Article 27 ICCPR,¹³² incorporated into Norwegian Law by the 1999 *Human Rights Act*,¹³³ with higher authority than an ordinary Act of the Parliament. Article 27 ICCPR is of particular interest for this case study, especially in light of the interpretation given to it by the Human Rights Committee,¹³⁴ which conceives the provision in point as the substantial basis for a minority’s culture, including, e.g., a particular way of life associated with the use of land resources. In relation to the Sámi, this means that lands, pastures, waters, and other natural resources of importance for traditional livelihoods enjoy legal protection against interference by the government that could threaten the exercise of Sámi culture and livelihood – both for individuals and communities. In addition, Article 27 ICCPR implies an obligation by the government to identify lands of indigenous peoples, further strengthening Sámi land rights. The Norwegian government supports this interpretation.

Land and Fishing Rights of Indigenous Peoples in Russia

(by Federica Prina^o and Alexandra Tomaselli)

In the Russian Federation, 46 peoples have been legally recognized as “small-in-number indigenous peoples of the North, Siberia and the Far East”. Russia has not ratified ILO Convention 169, and abstained from voting for the UNDRIP.

¹²⁹ See n. 22 above.

¹³⁰ Act No. 85 of June 17, 2005 relating to Legal Relations and Management of Land and Natural Resources in the County of Finnmark, available at <<http://www.wipo.int/wipolex/en/details.jsp?id=11129>> (accessed 27 May 2016).

¹³¹ See Committee on the Elimination of Racial Discrimination, Concluding observations on the twenty-first and twenty-second periodic reports of Norway, U.N. Doc. CERD/C/NOR/CO/21-22 of 28 August 2005, para. 29.

¹³² See n. 23 above.

¹³³ Act relating to the strengthening of the status of human rights in Norwegian law, available at <<http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19990521-030-eng.pdf>> (accessed 27 May 2016).

¹³⁴ See n. 24 above and corresponding text.

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Regarding the former, the Russian Parliament held two hearings on its potential ratification in 1994 and in 2006, but both ended with a rejection based on the assumption that the Convention is incompatible with Russian legislation. As to the latter, during its second Universal Periodic Review in 2013, Russia stated that it had no intention to approve or endorse the UNDRIP, affirming that it already complied with the standards enshrined in it. Indigenous peoples are constitutionally recognized in Article 69 of the 1993 Constitution of the Russian Federation, stating that “[t]he Russian Federation shall guarantee the rights of the small-in-number indigenous peoples in accordance with the universally recognized principles and norms of international law and international treaties of the Russian Federation”. This article was legally implemented by the adoption of three federal laws, which specifically apply to indigenous peoples, namely the Laws “On Guarantees” (1999), “On *Obshchinas*” (2000), and “On Territories” (2001).¹³⁵ Formally, these laws provide indigenous peoples with a number of individual and collective rights, guaranteeing, *inter alia*, the right to freely use land and renewable natural resources in the territories they traditionally occupy, and areas where they engage in traditional economic activities (“On Guarantees”, Article 8, para.1). However, problems seem to lie in the effective implementation of the laws or their constant amendment. For instance, Article 11 of the original text of the Law “On Territories” stated that the use of territories of traditional natural use (in Russian: *Territorii Traditsionnogo Prirodopol'zovaniya*, hereinafter TTP) shall be free of charge. However, the Russian government has undermined the right of the indigenous peoples to free land use by amending Article 11 through Federal Law No.118-FZ of 2007. It has also failed to designate such TTP at the federal level. Regarding fishing rights, Article 25 of the Russian Federal Law No.166-FZ of 2004 “On fishery and the protection of biological water resources” foresees an exception clause for indigenous peoples from the requirement of holding a fishing permit, when fishing is carried out to satisfy subsistence needs and follows traditional practices at the level of the indigenous community. This provision is also poorly applied.

At the same time, indigenous peoples have recently successfully litigated to uphold their fishing rights before domestic Russian courts, in order to guarantee the community’s livelihood. In some cases, Russian courts have appeared biased and given reasons for concern, showing that the Russian judiciary is not always fully independent, and there have been instances of judges being subjected to pressure from various actors. At the same time, in other cases Russian courts (including the Supreme Court) have provided some protection to indigenous peoples, ruling on a number of indirect or direct safeguards. First, they have affirmed that settlements of indigenous peoples shall be taken into consideration prior to the elaboration and issuing of documents on fishing grounds used for industrial fishing.¹³⁶ Secondly, they have guaranteed a (fairer) procedure in the bids for both hunting and fishing licenses, thereby indirectly underlining how indigenous peoples may be easily excluded from such tenders.¹³⁷ Thirdly, they have stressed that indigenous peoples have the right to pursue their traditional lifestyle and economic activity, as well as to access land free of charge.¹³⁸ Fourthly, one court of second instance directly referred to the exception clause for indigenous peoples from the requirement of holding a fishing permit, when fishing is carried out to satisfy subsistence needs and follow traditional practices.¹³⁹ Finally, the Constitutional Court of the Republic of Sakha (Yakutia), in its ruling of 2014, upheld indigenous peoples’ right to priority in the exploitation of wildlife and referred to mechanisms of settlement in cases of land disputes that take into account the culture of indigenous peoples.¹⁴⁰ In these cases, the courts have observed, although by no mean explicitly, the relevant standards contained in the UNDRIP. We may therefore conclude that a few of the standards of the UNDRIP regarding indigenous peoples’ land and fishing rights have been (partially) echoed in Russian Federation’s domestic jurisprudence, although it is very difficult to establish whether Russian courts may have been aware of such standards. This ultimately supports the argument of the universal value of the UNDRIP.

In practice, sometimes indigenous peoples face many difficulties in bringing their cases to courts, which suggests that many violations of their rights are often ignored; and, when cases are adjudicated by courts, it remains unclear whether the resulting rulings are fully executed. At the same time, however, Russian courts may play a significant role in the protection of indigenous peoples, as shown by the cases just summarily described. Furthermore, the Law “On Guarantees” states at Article 14 that “[indigenous peoples have] the right to judicial defence of their ancestral lands, traditional way of life, economic activity and traditional practices [...] In the consideration by courts of cases involving indigenous peoples [...] the traditions and customs of these peoples can be taken into account, when they do not contradict federal legislation

¹³⁵ Respectively, Law No.82-FZ “On Guarantees of the Rights of Small-in-Number Indigenous Peoples of the Russian Federation” (“On Guarantees”), adopted in 1999; Law No.104-FZ “On General Principles of the Organization of *Obshchinas* of Small-in-Number Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation” (“On *Obshchinas*”), adopted in 2000; and Law No.49-FZ “On Territories of Traditional Nature Use of the Small-in-Number Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation” (“On Territories”), adopted in 2001.

¹³⁶ See *Obshchina ‘Kignach’ v. the governor of Kamchatka Krai*, Supreme Court, 2009.

¹³⁷ See *Obshchina Saur v. Fishery agency of Amur oblast*, Arbitrazh Court of Appeal, 2011; *Federal anti-monopoly agency of Primorskii Krai v. the administration of Primorskii Krai*, 5th Arbitrazh Court of Appeal, 2012.

¹³⁸ See *Obshchina Saur v. Fishery agency of Amur oblast* and *Prosecutor of Primorskii Krai v. four individuals belonging to an indigenous people of Primorskii Krai*, General Court of 2nd instance, 2011.

¹³⁹ See *Prosecutor of Primorskii Krai v. four individuals belonging to an indigenous people of Primorskii Krai*.

¹⁴⁰ See *MP of the Republic of Sakha V.H. Gubarev on the constitutionality of Point 200 of Order No. 285*.

and the laws of the subjects of the Russian Federation. For the effective judicial protection of the rights of indigenous peoples, authorised representatives of small-in-number peoples can participate in the said judicial defence”. Therefore, the members of indigenous communities and their associations are guaranteed by law a special regime of legal protection, with the participation of members of these groups themselves, so as to ensure the fairness of proceedings.

4. Overall Assessment and Preliminary Conclusion *****

The analysis of the case studies just presented has drawn an overall picture looking like a double-sided coin.

On the one hand, only a few cases are characterized by blatant violations of international legal standards applicable to indigenous peoples. In most cases, indigenous peoples’ rights are actually recognized by States, especially at the level of the legislature and the judiciary. This consideration applies not only as regards States parties to ILO Convention 169, but more generally to the majority of States considered in this report, irrespective of whether or not they have ratified the said convention. This further confirms the status of the main international legal standards concerning the rights of indigenous peoples as principles of customary international law, with respect to which the State behaviour just described attains the role of practice accompanied by *opinio juris*. The fact that in some cases violations take place do not militate in any way against this conclusion. In fact, as noted by the ILA Committee on the Rights of Indigenous Peoples, quoting the ICJ, “‘for a rule to be established as customary, the corresponding practice must [not] be in absolutely rigorous conformity with the rule’, on the condition that ‘instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule’. The fact that the said negative examples are actually treated as violations is demonstrated by the univocal and virtually unanimous condemnation of them by the international community, including U.N. bodies”.¹⁴¹ In fact, in virtually all cases discussed in the previous section, the existence of a State obligation to respect the said standards is unanimously and unquestionably confirmed by international courts and other human rights monitoring bodies. Even when the position of the latter courts and bodies “is based on the prospective violation that the behaviour in point may produce with respect to obligations arising from treaties binding the State concerned, the multilateral treaties pertinent to indigenous peoples’ [...] rights – taken as a whole – form a thick network of obligations which affect virtually every government in the world”.¹⁴²

On the other hand, the dark side of the coin is represented by the rather unsatisfactory degree of practical implementation and effective realization of the rights of indigenous peoples, especially on the executive and administrative level, which characterize a good number of the case studies described in the previous section. One might assert that this is a fate characterizing human rights generally speaking, as at the present stage of evolution of international human rights law the effective degree of implementation of either human rights rules in general or decisions of human rights monitoring bodies in particular is in many ways problematic at the global level. It is true that the phase of the implementation of the existing standards in daily reality is the more complicated one to achieve in practice, as it is influenced by a number of meta-legal factors, including economic, social, cultural and political considerations. The fact remains, however, that the phase of implementation is the most important one to give effectiveness to human rights – i.e. to make it possible that human rights, including indigenous peoples’ rights, are actually and fully enjoyed by the intended beneficiaries of the relevant rules. In fact, recognizing and proclaiming human rights on paper is not enough, as they must find realization in the real world. It is true that some lack of implementation does not allow to cast doubts on the actual existence and validity of the relevant standards as rules of international law which States are bound to respect and to which they are obliged to give effectiveness. However, if these standards are not properly implemented, human rights (including indigenous peoples’ rights) fail to achieve their paramount purpose, i.e. to ensure their *effective enjoyment* by individuals and communities.

The preliminary conclusion which can be drawn from the work carried out so far by the present Committee is twofold. Indeed, on the one hand, further developments in the field of international law on indigenous peoples are necessary in order to remove and prevent the situations that still exist in the world characterized by blatant violations committed by States in breach of legal standards existing in the field. On the other hand, it is at the same time indispensable to work on the phase of implementation, beginning from promoting a general awareness that such a phase is fundamental for ensuring effective realization of human rights. Too often, in fact, experts, practitioners and even common people celebrate domestic and international judgments adjudicating indigenous peoples’ rights as huge victories, but then they lose sight of the phase of implementation, *de facto* leaving some governments free to continue to deny such rights at the political level through not properly implementing the relevant judicial decisions.

5. Future Work of the Committee

In view of the 2018 Biennial Conference of ILA, when the mandate of the Committee will expire, we plan to concentrate on the following activities:

***** This Section has been written by Federico Lenzerini, Co-Rapporteur of the Committee. As it is made clear in the title of this section, the conclusions drawn herein are only preliminary and based on the case studies assessed by the Committee so far. These conclusions, therefore, may be subject to revision in the course of the future work of the Committee.

¹⁴¹ See Final Report, “Sofia Conference (2012)”, p. 27, quoting ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, *ICJ Reports*, 1986, p. 14, para. 186.

¹⁴² See ILA Committee on the Rights of Indigenous Peoples, Final Report, “Sofia Conference (2012)”, p. 27.

- further examination of already assessed case-studies which at present are still pending;
- selection and study of other cases of interest for our research;
- investigation of the legal, quasi-legal and practical barriers blocking the road from international legal standards to effective protection in a number of areas of the world;
- elaboration of suggestions and recommendations (including, if opportune, suggestions and recommendations addressed to specific States with respect to particular cases) aimed at removing and preventing violations of indigenous peoples' rights by States;
- elaboration of suggestions and recommendations for improving the phase of implementation of domestic and international decisions adjudicating and/or affirming the rights of indigenous peoples;
- identification and selection of *best practices* relating to countries that have, or are attempting to, implement UNDRIP (and other relevant instruments') standards and provisions, and evaluation of how such practices could be applied to other areas, taking into account existing cultural and social differences;
- definition of strategies which might be applied worldwide by legal researchers and activists;
- preparation of suggestions and recommendations for involving the private sector, including national and multinational enterprises, in the elaboration and realization of concrete strategies for making indigenous peoples' rights – especially land rights – effective;
- elaboration of final conclusions based on a wider range of case studies.